(8)

No. 97-731-CFX

Title: United States, Petitioner
v.
Chris W. Beggerly, et al.

Docketed:
October 28, 1997

Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Oct 16 1997	Application (A97-284) to extend the time to file a petition for a writ of certiorari from October 26, 1997 to November 25, 1997, submitted to Justice Scalia.
	Oct 17 1997	Application (A97-284) denied by Justice Scalia.
	Oct 27 1997	Petition for writ of certiorari filed. (Response due November 27, 1997)
	Nov 26 1997	Brief of respondents Chris W. Beggerly, et al. in opposition filed.
	Dec 10 1997	DISTRIBUTED. January 9, 1998
	Dec 15 1997	Reply brief of petitioner United States filed.
	Jan 9 1998	Petition GRANTED. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 23, 1998. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 25, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 10, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT April 27, 1998. **********
	Feb 4 1998	Record filed.
	Feb 20 1998	Joint appendix filed.
	Feb 23 1998	LODGING conissitng of ten copies of Lodging 1 Adams Pleading and Lodging II, Tequesta submitted by the Solicitor General.
	Feb 25 1998	Brief of petitioner United States filed.
	Mar 16 1998	CIRCULATED.
	Mar 23 1998	Brief of respondents Chris W. Beggerly, et al. filed.
	Mar 30 1998	Record filed.
	Apr 10 1998	Reply brief of petitioner United States filed.
	Apr 10 1998	LODGING consisting of ten sets of three documents, "O'Reilly Code and Regulations", "Diary of Bernardo De Galvez" and "Knipfing Deposition Transcipt" submitted by the Solicitor General
	Apr 27 1998	ARGUED.

Supreme Court, U.S.
FILED

97 731 OCT 27 1997

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CHRIS W. BEGGERLY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
MARTIN W. MATZEN
WILLIAM B. LAZARUS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202)514-2217

9981

QUESTIONS PRESENTED

1. Whether an "independent action" brought against the United States to set aside a consent judgment entered in a previous quiet title action brought by the United States may be premised on "ancillary jurisdiction" deriving from the original quiet title action, and does not require an independent jurisdictional basis including a waiver of sovereign immunity.

2. Whether the 12-year statute of limitations applicable to actions against the United States under the Quiet Title Act, 28 U.S.C. 2409a(g), was subject to equitable tolling.

3. Whether the court of appeals had appellate jurisdiction to review the district court's denial of respondents' motion for summary judgment.

4. Whether the court of appeals erred in reopening the consent judgment and upholding respondents' claim of title to lands in the State of Mississippi based on a 1781 land grant by a Spanish governor who, as this Court held in ~~*United States v.*~~ *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570 (1851), had no authority to make such a grant.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. Petitioner was defendant in the district court and appellee in the court of appeals. The respondents, Chris W. Beggerly, Clark M. Beggerly, Velma B. Garner, Suzanne Reed, and David Reed, were plaintiffs in the district court and appellants in the court of appeals.

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In the Supreme Court of the United States

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No.

UNITED STATES OF AMERICA, PETITIONER

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CHRIS W. BEGGERLY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The court of appeals' substitute opinion rendered on rehearing (App., *infra*, 1a-16a), from which review is sought, is reported at 114 F.3d 484. The initial decision of the court of appeals (App., *infra*, 17a-31a) is unreported. The district court's memorandum order granting the government's motion to dismiss and denying respondents' motion for summary judgment (App., *infra*, 32a-44a) is unreported, as is the district court's memorandum order denying rehearing (App., *infra*, 47a-51a).

JURISDICTION

The court of appeals entered its initial judgment and decision on May 29, 1997. The court of appeals thereafter replaced that decision with a new decision on July 28, 1997, and concurrently denied a petition for rehearing. App., *infra*, 52a-53a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Reprinted in an appendix to this petition (App., *infra*, 61a-63a) are the pertinent provisions of the Quiet Title Act, 28 U.S.C. 2409a, and Federal Rule of Civil Procedure 60(b).

STATEMENT

1. a. This case arises out of a dispute between respondents and the United States over ownership of lands on Horn Island, Mississippi. Horn Island is one of five barrier islands off the Mississippi coast in the Gulf of Mexico (R.E. 32),[1] and is within the territory acquired in 1803 by the United States in the Louisiana Purchase. *United States* v. *Louisiana*, 363 U.S. 1, 80-81 (1960); *Garcia* v. *Lee*, 37 U.S. (12 Pet.) 511 (1838).

After the Louisiana Purchase, Congress established a commission to ascertain the titles and claims to lands east of the Pearl River in Mississippi, west of the Perdido River in Alabama, and south of the 31st degree of north latitude, an area that includes Horn Island. Act of Apr. 25, 1812, ch. 67, 2 Stat. 713. The 1812 Act required every person claiming lands in that area under French, British,

[1] Cites to "R.E." refer to pages in respondents' appendix of record excerpts filed in the court of appeals. "Supp. R.E." refers to the supplemental appendix of record excerpts filed in the court of appeals by the government. Cites to "R." refer to pages in the official record on appeal.

and Spanish grants to deliver evidence of the claim to the Commissioner, who was directed to examine the claims; to ascertain, *inter alia*, whether and when the lands were inhabited or cultivated, and when and under what authority they were surveyed; and to prepare a report on the claims for Congress. §§ 5, 7, 8, 2 Stat. 715, 716. In 1819, Congress confirmed the claims that were recommended by the Commissioner and directed the issuance of certificates and patents for the confirmed claims. Act of Mar. 3, 1819, ch. 100, §§ 1-2, 3 Stat. 528-530. No claims for lands on Horn Island were recommended by the Commissioner or confirmed by Congress; to the contrary, in 1816, the Commissioner specifically rejected a claim to Horn Island by the heirs of one Catalina Boudreau. See p. 5, *infra*.[2] In 1844, Congress permitted persons with claims to lands east of the Pearl River, among others, "which might have been perfected into a complete title" under a prior sovereign's laws, to file suit in federal district court to substantiate such claims, with a right of direct appeal to this Court. Act of June 17, 1844, ch. 95, 5 Stat. 676; Act of May 26, 1824, ch. 173, § 1, 4 Stat. 52.[3] Neither party to this case has suggested that any lands on Horn Island were so claimed.

[2] Congress twice permitted persons whose claims had not been recommended for confirmation by the Commissioner to present additional supporting evidence (Act of Mar. 3, 1819, ch. 100, §§ 6-7, 3 Stat. 530-531; Act of May 24, 1828, ch. 93, 4 Stat. 299), and it subsequently confirmed several claims (Act of May 8, 1822, ch. 128, 3 Stat. 707; Act of May 28, 1830, ch. 146, 4 Stat. 408). We are unaware of any claims recommended or confirmed for lands on Horn Island.

[3] The 1844 Act extended, to lands east of the Pearl River in Mississippi, provisions of the 1824 Act that had allowed those claiming lands in Arkansas and Missouri to petition the district court for recognition of their claims. See Act of May 26, 1824, ch. 173, 4 Stat. 52. Section 5 of the 1824 Act, and by incorporation the 1844 Act as well, provided that "any claims to lands * * * within the purview of this act, which shall not be brought by petition before the said courts,

Since the early 1800s, the United States has openly acted as owner of Horn Island. The government's first official plat survey for Horn Island, conducted in 1824, identified the island as public domain, as did a subsequent official dependent resurvey conducted in 1846, and a supplemental plat survey in 1907. R.E. 70. Dependent resurveys conducted in 1928[4] and 1979 showed that the United States had issued no patents for any lands on Horn Island before the 1907 survey, and that no patent had ever been issued for the Horn Island lands claimed by respondents. R.E. 71. In addition, since the mid-1800s, the United States Government has issued a series of Executive Orders and Public Land Orders providing for the public use of lands at issue here and other lands on Horn Island, including use for military and lighthouse purposes, a chemical warfare station, a Coast Guard target range, and a wildlife refuge.[5]

b. Respondents' predecessor in interest, Clark Beggerly, Sr., purchased color of title to the lands at issue here, as well as other lands, by quitclaim deed at a delinquent tax sale offered by Jackson County, Mississippi, in 1950. Mr. Beggerly, Sr., paid $51.20 for 626 acres described as located on Horn Island; he and a friend also paid $31.25

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within two years from the passing of this act, * * * shall be forever barred, both at law and equity, and no other action, at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever, in relation to said claims." 4 Stat. 54.

[4] The resurvey conducted in 1928 reflected significant accretions and accordingly redesignated the lot numbers within the sections. R.E. 71.

[5] See Exec. Order of Aug. 30, 1847; Exec. Order of July 7, 1852; Exec. Order of Sept. 3, 1900; Exec. Order of Apr. 12, 1906; Exec. Order No. 4262 (July 3, 1925); Exec. Order No. 5562 (Feb. 20, 1931); Exec. Order No. 10,355, 17 Fed. Reg. 4831 (1952); Public Land Order No. 1636, 23 Fed. Reg. 3388 (1958).

for another 225 acres on the Island, of which he retained 103 acres upon later division. App., *infra*, 32a-33a.

In 1971, Congress created the Gulf Islands National Seashore (GINS) for preservation purposes, and authorized the Secretary of the Interior to acquire several Gulf Coast islands, including Horn Island. See 16 U.S.C. 459h, 459h-1. In 1972, the National Park Service began appraising lands within the boundaries of GINS, including some lands on Horn Island, as an initial step toward acquisition of properties. The 626-acre parcel claimed to be owned by respondents was appraised for $156,000, and the 103-acre parcel was appraised for $27,125. The Park Service offered respondents slightly larger amounts than those appraised values for the lands they claimed, conditioned on their delivery of clear title to the parcels. The government's title contractor, however, found no evidence that the United States had ever issued any patents for the property claimed by respondents. In the absence of clear title, the government did not further pursue purchase of the property from respondents. R.E. 68.[6]

In 1979, the United States filed suit against respondents and nearly 200 other defendants to quiet title in the United States to lands claimed by private persons on Horn Island, Petit Bois Island, and Ship Island. *United States of America* v. *Adams, et al.*, Civil Action No. S79-0338(C) (D. Miss.). For three years, the parties conducted research

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[6] Respondents originally maintained that their title derived from federal patents that had been issued to Indians in 1840 and recorded in the 1950s in the Jackson County Chancery Clerk's Office by an attorney acting for the 1950 tax-sale purchasers. See R.E. 75. Preliminary research by the government's title contractor suggested that respondents' title was derived from three patents issued to Indians in 1840, but subsequent research revealed that those Indian patents had in fact been issued for different lands in northeastern Mississippi, and that no patents had ever been issued for Horn Island. R.E. 68; R. 199.

and discovery on their claims. During that litigation, the United States filed a pleading that, among other things, referred to a claim to Horn Island that had been rejected by the land commission established by Congress in 1812, and contended that that claim therefore provided no basis for respondents' claim to lands on Horn Island. See Mem. in Supp. of Pl.'s Objections to Admis. of Defs.' Exs. at 5-6 (filed 11/19/82); pp. 2-3, *supra*.

That pleading in the *Adams* case identified the source of the information about the rejected claim as the report to Congress on claims east of the Pearl River by Commissioner William Crawford (reproduced in 3 *American State Papers, Public Lands* 7 *et seq.* (1834)). Commissioner Crawford's report to Congress identified a claim by the heirs of Catalina Boudreau[7] to a grant purportedly issued to her on August 1, 1781, by Bernardo de Galvez, then the Governor of the Spanish province of Louisiana. *Id.* at 15 (item 51). Crawford's report also explained that he had rejected the Boudreaus' and several other claims either because they were "forfeited—most of them under the Spanish law, for the want of inhabitation and cultivation; and do not appear to be entitled to confirmation under any law of the United States" (*id.* at 17); or because they were "derived from officers who had no right to grant, or, at most, not on so extensive a scale" (*ibid.*). In 1850, this Court held, in addressing claims to lands on two islands neighboring Horn Island, that, on August 1, 1781, Bernardo de Galvez had no legal authority to issue grants for lands east of the Pearl River. *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570, 579-580 (1851).[8]

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[7] Variously spelled Catherine, Catarina, and Catalina, and Boudreau, Beaudreaux, Baudreau, Bodro, and Baudro.

[8] As the Court noted in *United States* v. *Louisiana*, 363 U.S. at 80-81, the lands in question were ceded by France to Great Britain in 1763, and were then made part of the British province of West Florida. In 1781, Spain and Great Britain were at war, and the British forces surrendered West Florida to de Galvez on May 9, 1781. The Court concluded in *Power's Heirs* that, although Spain held the relevant lands under military occupation on August 1, 1781, there was no evidence that Spanish law had been introduced into West Florida, or that de Galvez had been given civil power to grant lands there. De Galvez was then the Governor of the Spanish province of Louisiana, but the Court stated that his civil authority did not extend to West Florida. 52 U.S. (11 How.) at 579-580.

In December 1982, respondents and the other defendants to the United States' quiet title suit executed a "Stipulation and Settlement" (App., *infra*, 56a-60a) in which they agreed to accept $400,000 as "full and just compensation and in full satisfaction of any and all claims of whatsoever nature * * * against the United States of America by reason of the settlement of the action" (*id.* at 57a-58a), in return for entry of an attached consent judgment. That consent judgment quieted title "in favor of the United States with regard to all lands and interests on Horn and Petit Bois Islands which defendants have or may have claimed." *Id.* at 54a. The judgment also permanently enjoined the defendants (including respondents herein) from asserting any adverse claim to the property. *Ibid.* As a result of the settlement, respondents received $208,175.87 of the $400,000 paid by the United States. Supp. R.E. tab 3, at 4.

c. Despite the settlement of the quiet title action, respondents continued to investigate their claim to the tax sale parcels. According to an affidavit later filed in this case, Edith Axelson, a researcher hired by respondents, stated that in 1991 she had located in the National Archives documents relating to the "Boudreau Grant." R.E. 126. Axelson attached to her affidavit a copy of materials purportedly documenting an August 1, 1781, grant of Horn Island to Catalina Boudreau by Bernardo de Galvez. R.E.

129-132. In August 1993, respondents hired Hans Baade, a law professor at the University of Texas, to "evaluate and determine the legal effect of * * * the 'Boudreau Grant.'" R.E. 134. Baade's resultant legal "Memorandum on Title to Horn Island" (R.E. 150-189) concluded that the grant to Catalina Boudreau by de Galvez was valid. Baade, however, made no reference to this Court's holding in *Power's Heirs*, 52 U.S. (11 How.) at 579-580, that de Galvez had lacked legal authority to issue grants to lands east of the Pearl River on August 1, 1781.[9] Nor did he address the existence of any chain of title between Catalina Boudreau and respondents.[10]

2. On June 1, 1994, respondents filed a complaint in district court, requesting that the court set aside the 1982 settlement agreement and the consent judgment in the United States' quiet title action, and award them just compensation for an "inverse condemnation" effected by entry of that 1982 consent judgment. See R.E. 29-46 (complaint). Relying on the "Boudreau Grant" (see R.E. 40), the complaint asserted that the United States had fraudulently represented federal ownership of the disputed property on Horn Island (R.E. 42-44); that "mutual mistake of a material fact" had caused respondents to agree to the 1982 settlement (R.E. 44); and that the entry of the 1982 consent judgment constituted a taking of respondents' property without just compensation entitling them to a monetary award by way of inverse condemnation (R.E. 45-46). As relief, respondents sought to have the court set aside the judgment in *Adams* and to award them "damages" of not less than $14,500 per acre, plus interest since 1982. R.E. 45.

[9] Baade also did not address this Court's decision in *United States* v. *Porche*, 53 U.S. (12 How.) 426, 432 (1852), holding that, under the 1844 Act permitting certain claimants to lands east of the Pearl River to present their claims to federal district court, any claims filed after June 17, 1846, were jurisdictionally barred.

[10] As noted above (page 5, note 6, *supra*), respondents originally maintained that their title purchased at the tax sale in 1950 derived from three patents issued to Indians in 1840, but those patents were in fact issued for different lands. We are not aware of any connection between the 1781 Boudreau Grant and the 1840 Indian patents.

In January 1995, the United States filed a motion to dismiss the complaint for lack of jurisdiction. The government contended that there was no statutory basis for jurisdiction, including no waiver of sovereign immunity, for respondents' action to set aside the judgment in the quiet title action. R. 52. Respondents in turn filed a motion for summary judgment in March 1995, asserting that the court had jurisdiction over their "independent action" to set aside the consent judgment based on jurisdiction in the initial quiet title action brought by the United States. Resp. Mem. in Supp. of Mot. for Summ. J. 5, 16, 20-21. In addition, respondents argued (*id.* at 23-24) that both the Quiet Title Act (QTA), 28 U.S.C. 2409a, and the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491(a)(1), provided the district court with jurisdiction over their claims. In July 1995, respondents filed a motion to amend their complaint (R. 190-191) by adding the QTA and the Tucker Act as jurisdictional bases, but they did not otherwise seek to amend the complaint or the relief sought in the complaint; they did not, for example, request that the district court quiet title to the Horn Island lands in *them*.

The district court granted the government's motion to dismiss and denied respondents' motion for summary judgment. App., *infra*, 32a-44a. The court first observed that respondents' complaint was filed nearly 12 years after entry of judgment in the United States' quiet title action, well after the one-year period allowed by Federal Rule of Civil Procedure 60(b) for motions to set aside a final judgment based on fraud. App., *infra*, 39a-41a. The court also

noted that, although respondents had relied on Rule 60(b) in their complaint, they sought relief in their summary judgment motion through an "independent action in equity"; it rejected that basis for relief as "substantively and procedurally deficient," and further concluded that the action was untimely under the equitable doctrine of laches. *Id.* at 40a n.13. The court also ruled that respondents had not met the legal prerequisite for seeking rescission of a settlement agreement, namely, returning the moneys received in settlement and returning the parties to the *status quo ante*; thus, the court concluded, respondents must be "deemed to have ratified the settlement agreement." *Id.* at 41a. The court further rejected respondents' inverse condemnation claim—that the entry of the consent judgment in 1982 constituted a taking of their property for which just compensation was due—on the ground that the Court of Federal Claims had exclusive jurisdiction over that claim under the Tucker Act, 28 U.S.C. 1491. App., *infra*, 42a-43a.

Finally, the court pointed out that a party seeking to set aside a judgment on the basis of fraud faces a "stiff standard of proof," and it observed that respondents had "wholly failed to discuss [their] allegations of fraud in specific terms of the[] critical elements" for making out such a claim. App., *infra*, at 38a-39a n.9; see also *id.* at 39a-40a & n.12 (court's "careful[] review[] [of] the record" establishes that respondents' allegations of fraud are devoid of evidentiary support). Rather, the court found, "[t]he United States acted in good faith in the settlement of [the *Adams* litigation]." *Id.* at 43a. The court remarked that the United States "could have refused to pay for what it already owned"—noting that respondents' own attorneys had advised them at the time that they had no valid claim to the disputed lands—and it characterized the amount respondents had accepted in the *Adams*

settlement as a "'six-figure' windfall." *Id.* at 43a-44a & n.16. Having ruled that the case should be dismissed, the court then denied respondents' motion for summary judgment, without addressing the merits of that motion. *Id.* at 44a.

3. A divided panel of the court of appeals reversed. App., *infra*, 17a-25a. The majority concluded that the district court had erred in dismissing respondents' action for lack of jurisdiction (*id.* at 20a-21a), and it directed the district court on remand to enter judgment quieting title in respondents to Horn Island, and to fashion an appropriate monetary remedy for respondents (*id.* at 25a). Judge Garza dissented. *Id.* at 25a-31a.

4. The United States filed a petition for rehearing. The panel, still divided, issued a "substitute" opinion on rehearing (App., *infra*, 1a-16a), and concurrently issued an order denying the petition for rehearing "[o]ther than as reflected in the substituted opinion" (*id.* at 52a-53a).

a. The majority first concluded that the district court had erred in dismissing the complaint. According to the court, the time limits in Rule 60(b) for setting aside a judgment based on alleged fraud "do[] not 'limit the power of a court to entertain an independent action'" to set aside a judgment. App., *infra*, 4a. Moreover, the majority stated, "an independent action filed in the same court that rendered the original judgment is a continuation of the original action for purposes of subject matter jurisdiction." *Id.* at 4a-5a. Therefore, the court concluded, neither an independent basis for jurisdiction nor a waiver of sovereign immunity is required "to bring an independent action in the same court as the original action." *Id.* at 5a.

The majority then proceeded to address the merits of respondents' independent action to set aside the consent

judgment, and it ordered that relief. App., *infra*, 5a-8a. "Crucial to that determination," the majority stated, was its conclusion that the district court had erred in failing to recognize the validity of the de Galvez grant of Horn Island to Catalina Boudreau in 1781. *Id.* at 6a. The court acknowledged that the document found by Axelson in the National Archives and proffered by respondents to support their claim "is not the original grant," but it concluded that the proffered document was the only available copy, "presumably" because a fire had destroyed the archives where the original would have been stored. *Ibid.* On that basis, the court decided that the English translation of the purported grant was "admissible to prove its existence." *Ibid.*

The majority further acknowledged that a congressionally established commission had rejected the application by Boudreau's heirs to Horn Island, but, it observed, that commission was not given authority to adjudicate title but was required to submit claims to Congress for final action; therefore, "the land commissioner's refusal to accept the [Boudreaus'] application did not conclusively determine that Horn Island belonged to the United States." App., *infra*, 6a-7a. But rather than remand the issue of the validity of the Boudreau Grant to the district court (which had not passed on the question), the court of appeals itself addressed the issue, and concluded—based on Professor Baade's affidavit offered by respondents in support of their motion for summary judgment, which the district court had denied—that "the Boudreau Grant vested complete and valid title in Catarina Boudreau. On that record, therefore, we must conclude that the property at issue herein remained privately owned after the Louisiana Purchase and did not enter the public domain of

the United States" until the settlement of the quiet title action. *Id.* at 8a.[11]

Finally, the majority ruled on what it called respondents' "Quiet Title Act claim" (App., *infra*, 9a-11a). Even though respondents had only raised the QTA as an alternative basis for jurisdiction for their request for damages and vacatur of the consent judgment and had not requested that the district court quiet title in them, the majority read respondents' complaint as stating "alternative causes of action" and held that the district court had jurisdiction to adjudicate title under the QTA. *Id.* at 9a. Moreover, according to the majority, since "the United States has no legitimate claim to the land, the validity of [respondents'] title is a legal certainty," and so title should be quieted in their favor. *Ibid.* The court did not address the United States' open ownership of Horn Island since the Louisiana Purchase, or the absence of any showing by respondents of a chain of title between Boudreau and the 1950 tax sale by which Clark Beggerly, Sr., acquired color of title to the land.

The majority rejected the government's argument that any action by respondents under the QTA to adjudicate title in lands on Horn Island was barred by the statute of

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[11] The majority stated that respondents' "involuntary settlement" of the *Adams* litigation, based on their "inability to prove their title" derived from the Boudreau Grant, was "directly caused by the government's failure to produce the grant and its misrepresentation that no private disposal" (by federal patent of the lands) had ever been made. App., *infra*, 8a. The court did not, however, address the fact that the government had brought the claim of Boudreau's heirs to Horn Island, and the 1816 land commission's rejection of that claim, to the attention of the court in the *Adams* litigation. See p. 6, *supra*. The court also did not consider this Court's *Power's Heirs* decision—holding that de Galvez lacked authority to make grants east of the Pearl River—which Professor Baade had not discussed in his affidavit, and which the parties had not addressed in their briefs on appeal.

limitations, which requires that a quiet title action against the United States be brought within 12 years of the date on which the claim accrues (defined as the date on which the plaintiff or his predecessor in interest knows or should know of the United States' claim to the land). App., *infra*, 9a-10a; see 28 U.S.C. 2409a(g). The majority acknowledged that respondents had brought their action more than 12 years after they knew of the United States' claim to the Horn Island lands, but, it ruled, the QTA's statute of limitations should be tolled in this case "on equitable grounds." App., *infra*, 10a.[12] "On the record before us," the court stated, "the government may not benefit from the limitations period, especially in light of the diligence displayed by [respondents] in seeking the truth and pursuing their rights, which resulted in their discovering a grant that apparently not even custodians of the public land records could or would locate." *Ibid.* Accordingly, the court tolled the QTA's limitation period for respondents' benefit and remanded the case to the district court to enter judgment quieting title in their favor, subject to the United States' election to retain the property and pay respondents just compensation for it. *Ibid.*

b. Judge Garza dissented. App., *infra*, 11a-16a. He concluded that the district court had properly dismissed the case for lack of jurisdiction, because the government had not waived its sovereign immunity to suit. *Id.* at 11a. He disagreed with the majority's conclusion that an "independent action" could be treated as a continuation of the underlying suit with ancillary jurisdiction from the original action, and he suggested that the panel's jurisdictional

[12] The Court noted that respondents knew of the United States' claim to the land by 1976, when the United States ceased negotiating with them over the purchase of the property. App., *infra*, 10a. It did not address when respondents' predecessors in interest knew or should have known of the United States' claim.

ruling was inconsistent with this Court's decision in *Kokkonen* v. *Guardian Life Insurance Company of America*, 511 U.S. 375 (1994), and contrary to decisions of the Ninth and Eleventh Circuits. See App., *infra*, 11a, 12a n.1. Judge Garza also suggested that the majority had erred in reaching "the merits of [respondents'] cross motion for summary judgment, the validity of the Boudreau Grant, or the ownership of Horn Island," since all of those questions were "fraught with difficult fact questions that must be decided by the district court, which alone has jurisdiction to consider them." *Id.* at 16a. Therefore, even if subject-matter jurisdiction were present, Judge Garza would have remanded the case to the district court for further proceedings. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has made numerous significant rulings which are in error and which have broad implications for the publicly owned lands of the United States. First, the court concluded that a defendant to a civil action brought by the United States and resolved by a final judgment may bring an "independent action" to set aside that final judgment based solely on the jurisdiction in the initial action, well outside the time for setting aside a final judgment permitted by Federal Rule of Civil Procedure 60(b), and without any independent statutory basis for jurisdiction or waiver of sovereign immunity. That ruling conflicts with the decisions of other courts of appeals and, if left unreviewed, could provide a basis for reopening judgments in innumerable actions brought by the United States and long ago settled or litigated to final judgment. Second, the court ruled that the Quiet Title Act's 12-year statute of limitations for quiet title actions against the United States, 28 U.S.C. 2409a(g), is subject to equitable tolling. That ruling is erroneous and has similarly important implications for the stability of title to federal lands.

Third, the court ruled, on the merits, that the 1781 land grant from which respondents' claim ultimately derives is valid; that decision is directly in conflict with a decision of this Court, *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570 (1851), and completely ignores other issues concerning the validity of respondents' title. Finally, the court of appeals' decision to reach the merits of respondents' motion for summary judgment on respondents' appeal from the district court's *denial* of that motion presents an important question about the jurisdiction of the courts of appeals, as to which there is a conflict among the circuits. Certiorari is therefore warranted to review the decision of the court of appeals in this case.

1. In reversing the dismissal of the action, the court of appeals concluded that the district court had jurisdiction over respondents' "independent action" to set aside the 1982 consent judgment under its "ancillary jurisdiction," premised on the subject-matter jurisdiction for the original suit, and that there was no need for respondents to invoke an independent source of subject-matter jurisdiction and waiver of sovereign immunity for their suit against the United States. That decision conflicts with decisions of other courts of appeals, which have held that an independent action brought to set aside a judgment requires an independent source of jurisdiction. See *In re Hunter*, 66 F.3d 1002, 1005-1006 (9th Cir. 1995) (rejecting ancillary jurisdiction for independent actions, and holding that, absent diversity or other federal jurisdiction, court lacked jurisdiction over independent action to set aside settlement of bankruptcy case allegedly tainted by fraud); *United States* v. *Timmons*, 672 F.2d 1373, 1378-1379 (11th Cir. 1982) (similar; absent waiver of sovereign immunity, court lacked jurisdiction over action to set aside judgment in condemnation action brought by United States); *Andrade* v. *United States*, 485 F.2d 660, 664 (Ct. Cl. 1973)

(similar; no jurisdiction to set aside settlement of Indian Claims Commission case), cert. denied, 419 U.S. 831 (1974). But see *Weldon* v. *United States*, 70 F.3d 1, 4 (2d Cir. 1995) (holding that independent actions are ancillary to original suit); *Crosby* v. *Mills*, 413 F.2d 1273, 1275 (10th Cir. 1969) (same). That conflict among the courts of appeals on a question of federal jurisdiction warrants resolution by this Court.

The court of appeals' decision would render largely irrelevant Federal Rule of Civil Procedure 60(b)(3), which permits a district court to relieve a party from a judgment based on a showing of fraud. Under Rule 60(b), such a motion to set aside a judgment based on fraud, which is truly ancillary to the original suit, must be made within one year after entry of final judgment. Under the court of appeals' ruling, however, a party could invoke the ancillary jurisdiction of the district court well outside that one-year period and seek to overturn a judgment based on allegations of fraud. The ruling therefore undermines the value of finality of judgments reflected in Rule 60(b) and generally in the law.[13]

That consequence is particularly troublesome in the context of cases such as this one, involving title to real property. This Court has repeatedly observed that "[t]he policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water." *Nevada* v. *United States*, 463 U.S. 110, 129 n.10 (1983); see also *Arizona* v. *California*, 460 U.S. 605,

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[13] Rule 60(b) states that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding." But while Rule 60(b) thus confirms that an independent action may be brought outside the one-year period prescribed for motions under Rule 60(b)(3), it does not suggest that such an action may be brought without an independent source of subject-matter jurisdiction.

620 (1983) ("Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open."). As the Court explained in 1866:

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. * * * [W]here courts vacillate and overrule their own decisions * * * affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.

Minnesota Co. v. *National Co.*, 70 U.S. (3 Wall.) 332, 334 (1866). See also *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned."); *United States* v. *California & Oregon Land Co.*, 192 U.S. 355, 358-359 (1904).

The decision below is also in tension with this Court's decision in *Kokkonen* v. *Guardian Life Insurance Company of America*, 511 U.S. 375 (1994), as Judge Garza observed in his dissent below (App., *infra*, 11a). In *Kokkonen*, the Court held that a district court that had dismissed a case upon settlement by the parties did not have ancillary jurisdiction to enforce the parties' settlement agreement, which was not incorporated into the order of dismissal. Emphasizing that "[f]ederal courts are courts of limited jurisdiction," 511 U.S. at 377, the Court noted that the suit to enforce the settlement agreement was essentially a state-law suit for breach of contract, part of the consideration for which was dismissal of the

earlier suit, and therefore required an independent source of federal jurisdiction, such as diversity of citizenship. See also *Peacock* v. *Thomas*, 116 S. Ct. 862, 867 (1996). So too here, respondents' independent action is in effect a suit for monetary relief and an injunction based on allegations of fraud, and to go forward it requires an independent source of federal jurisdiction and waiver of sovereign immunity, neither of which is present.[14]

2. The majority did not merely conclude that the district court had jurisdiction to set aside the original judgment quieting title in the United States; it further held that the district court had jurisdiction to quiet title *in respondents' favor* under the Quiet Title Act (QTA), even though respondents' action was concededly filed more than 12 years after they knew of the United States' claim to the disputed lands, and was therefore outside the QTA's 12-year statute of limitations, 28 U.S.C. 2409a(g).[15] The court held that the QTA's 12-year limitation period was subject to equitable tolling. App., *infra*, 10a. It also ruled that the limitation period should be tolled in this case. *Ibid.* The question whether the QTA's limitation period is subject to equitable tolling is one of considerable importance to the management of federal lands, and the court's ruling on tolling is erroneous.[16]

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[14] Even if the district court had jurisdiction to entertain an independent action, the court of appeals had no basis to order that the prior consent judgment be set aside. See note 18, *infra*.

[15] Section 2409a(g) provides: "Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."

[16] The Ninth Circuit has also held that the QTA's statute of limitations is subject to equitable tolling. *Fadem* v. *United States*, 52 F.3d 202 (1995), vacated and remanded, 117 S. Ct. 1103 (1997). In

The QTA is the sole mechanism by which a party may bring the United States into court to force an adjudication of a title dispute involving land in which the United States claims an interest. See *Block* v. *North Dakota*, 461 U.S. 273, 275-276 (1983). The QTA is, moreover, addressed to an important aspect of the sovereignty of the United States, the ownership of property, which is subject to the plenary control of Congress. See U.S. Const. Art. IV, § 3, Cl. 2 (Congress has power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); *United States* v. *City and County of San Francisco*, 310 U.S. 16, 29-30 (1940). Suits under the QTA therefore implicate the core of sovereign immunity. See *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) (a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain"); cf. *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2040 (1997) (observing that Indian Tribe's suit against state officers was "the functional equivalent of a quiet title action which implicates special sovereignty interests"). Because of the special significance of publicly owned lands for the sovereignty of the United States, it is particularly important that title to those lands not be clouded or unsettled, beyond the permissible reach of title litigation that Congress has expressly authorized in the QTA itself.

Fadem, the United States filed a petition for a writ of certiorari, suggesting that the Court hold the petition pending *United States* v. *Brockamp*, 117 S. Ct. 849 (1997), which presented a similar question about equitable tolling of the statute of limitations for tax refund claims. After the Court concluded in *Brockamp* that the tax refund limitation period was not subject to equitable tolling, it vacated the Ninth Circuit's decision in *Fadem* and remanded the case for further consideration in light of *Brockamp*. 117 S. Ct. 1103 (1997). On remand, the Ninth Circuit reinstated its earlier decision. 113 F.3d 167 (1997).

The court's holding that the QTA's limitation period is subject to equitable tolling, if left unreviewed, could have serious consequences for the stability of title in federal lands. When Congress was considering legislative proposals that led ultimately to enactment of the QTA, a concern was expressed that the United States would become subject to stale claims to publicly owned lands, as to which any defense would be difficult because of the passage of time.[17] To avoid that problem, "Congress intended to foreclose totally any suit on claims that accrued more than 12 years prior to the [1972] effective date of the QTA." *Block* v. *North Dakota*, 461 U.S. at 286 n.23; see also *United States* v. *Mottaz*, 476 U.S. 834, 843 (1986) (QTA's "limitations period is a central condition of the consent given by the Act"). But if that limitation period is held subject to tolling, then the government could be forced frequently to defend its ownership of lands long believed to be definitively settled. In this case, for example, the United States has openly acted as owner of Horn Island since 1803, and there had been no attempt on the part of a private party to assert ownership to the Island as against the United States since 1816, yet now the court of appeals has directed that title be quieted in respondents.

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[17] When Congress in 1972 considered waiving sovereign immunity to quiet title actions, the Executive Branch urged that the Act be applied prospectively only (*i.e.*, not to claims that might have accrued prior to enactment). See *Block* v. *North Dakota*, 461 U.S. at 283. Ultimately, Congress and the Executive Branch agreed to a relatively generous 12-year statute of limitations, but recognized that the 12-year period would foreclose the revival of stale claims. Congress and the President concluded that the 12-year statute of limitations was a reasonable accommodation of private parties' interests in the adjudication of title disputes against the United States and the need to avoid the serious disruption of federal programs that might be caused by lawsuits involving long-dormant land disputes.

The majority erroneously relied on this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), for the proposition that the statute of limitations for actions brought under the QTA may be equitably tolled. App., *infra*, 10a & n.19. In *Irwin*, the Court held that actions against a federal agency under Title VII of the Civil Rights Act of 1964 are subject to equitable tolling, and stated that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. *Irwin*, however, involved a federal cause of action that may be brought against private parties as well as federal agencies, and well before *Irwin* the Court had held that the limitation period for bringing suit against a private employer was not jurisdictional but was subject to equitable tolling. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982). The Court concluded in *Irwin* that it would be anomalous to construe the identical provision as strictly jurisdictional when applied to the United States as a defendant, but not when applied to other defendants.

No such anomaly arises from applying the statute of limitations strictly in cases under the QTA, whereas anomalies do arise from a holding that the limitation period is subject to equitable tolling. First, the QTA does not provide any mechanism for resolving disputes among private parties as to land ownership; unlike the statute at issue in *Irwin*, the QTA has no application to defendants other than the United States. Thus, the QTA does not present the anomaly that would have existed in *Irwin* had the case been decided the other way—namely, permitting equitable tolling in suits against private parties but rejecting such tolling in suits based on the same statute brought against the federal government.

Second, the text of the QTA strongly suggests that Congress did not intend the statute of limitations to be subject to equitable tolling. The Court spoke in *Irwin* of a "rebuttable presumption" in favor of the availability of equitable tolling in federal causes of action, but it subsequently made clear that the courts should not apply the doctrine of equitable tolling when to do so would be "fundamentally inconsistent" with other aspects of a statutory structure set in place by Congress, including other aspects of the statute of limitations. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991); *United States* v. *Brockamp*, 117 S. Ct. 849, 852 (1997). In the context of the QTA, equitable tolling is inconsistent with both the generous 12-year limitation period and the statutory specification that that period runs from the date on which the plaintiff or his predecessor in interest "knew or should have known" of the government's claim. See 28 U.S.C. 2409a(g).

Nothing in the text or the legislative history of the QTA suggests that Congress intended that equitable tolling could be applied to extend still further this long limitation period. The QTA's 12-year statute of limitations already incorporates equitable considerations, see *Hart* v. *United States*, 585 F.2d 1280, 1284-1285 (5th Cir. 1978), cert. denied, 442 U.S. 941 (1979), and as one judge has observed, "[l]iberal estoppel and tolling, tacked onto a long period of limitations, is double counting." *Cange* v. *Stolter & Co.*, 826 F.2d 581, 599 (7th Cir. 1987) (Easterbrook, J., concurring). Further, it is particularly difficult to square equitable tolling with the fact that the QTA's statute of limitations provides that the cause of action accrues only when the plaintiff or his predecessor in interest "knew or should have known" of the claim of the United States. Whereas some limitation periods run from the event giving rise to the cause of action, whether or not the

plaintiff was aware of it (see, *e.g.*, *Lampf*, 501 U.S. at 361-362), that is not the case with the QTA. A plaintiff under the QTA is under an obligation to file suit only once he or his predecessor in interest actually knows of the government's claim, or reasonably should be aware of the facts giving rise to that claim. Allegations of misconduct by the government, such as concealment of material facts about the government's claim or misleading statements about the nature of that claim, might be relevant to determining when the plaintiff or his predecessor "knew or should have known of the claim of the United States." But those allegations should not provide a basis for *also* concluding that the limitation period was subject to tolling, even where, as here, the plaintiff concededly *did* know of the United States' claim. If the court's holding were accepted, then respondents' allegations about misrepresentations by the government apparently would both set the date on which the limitation period began, and also toll that period. Such a result would truly be "double counting."[18]

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[18] Even if the 12-year limitation period under the QTA were subject to equitable tolling in some circumstances, it was not subject to tolling here. The district court, based on its "careful review of the record," found "little or no evidence to support [respondents'] allegations of fraud, mutual mistake, and so forth," and indeed found that "[t]he United States acted in good faith in the settlement of [the *Adams*] case." App., *infra*, 43a. The court of appeals did not conclude that that determination was clearly erroneous. It merely reached its own conclusion that the government may not benefit from the limitation period, in light of what it believed to be the "diligence" displayed by respondents, which (it stated) "resulted in their discovering a grant that apparently not even custodians of the public land records could or would locate." *Id.* at 10a. The court of appeals did not suggest, however, that government attorneys or other personnel were aware of or intentionally withheld information supporting the validity of a claim by respondents through the Boudreau Grant. In fact, in the *Adams* case, the government cited to the *American State Papers* where there was a reference to such a grant accompanied by an explanation why the grant did not confer title. See p. 6, *supra*. Despite the government's reference to the issue in the *Adams* case, respondents did not retain their expert to search the Archives until 1991, nine years after the consent judgment was entered. That delay is scarcely consistent with "diligence" on respondents' part. For these same reasons that there was no basis whatever for equitable tolling of the QTA's limitation period (even if we assume, *arguendo*, that that period may ever be tolled), there was no basis for setting aside the prior consent judgment due to fraud or mutual mistake.

3. Even if the court of appeals' conclusion that the district court had subject-matter jurisdiction over this case were correct, its decision to address the merits of the land dispute *itself*, rather than remand the case to the district court (which had denied respondents' motion for summary judgment) for further proceedings led it into serious procedural and substantive error. Ordinarily, a denial of summary judgment is interlocutory and hence not appealable. Nonetheless, having reversed the district court's grant of the government's motion to dismiss respondents' complaint, the court of appeals reviewed and reversed the district court's denial of summary judgment in this case (reaching well beyond the relief sought even in the complaint by quieting title for respondents to the lands that they claimed on Horn Island). Its decision to review the district court's denial of summary judgment presents an important issue of appellate jurisdiction as to which there is a conflict among the courts of appeals: whether, on appeal from a district court's grant of a dispositive motion terminating litigation in favor of a defendant, a court of appeals may also review interlocutory rulings that were not related to the basis for that final judgment.

The Sixth, Eighth, Ninth, and Eleventh Circuits have squarely held that a court of appeals may not, in those circumstances, review interlocutory rulings that did not

"produce" the final judgment. As the Eleventh Circuit stated in *Foy* v. *Schantz, Schatzman & Aaronson, P.A.*, 108 F.3d 1347, 1350 (1997), "[o]nly those prior non-final orders that 'produced the [final] judgment' of the district court are subject to [the court of appeals'] review on appeal." The court held there that it could not, after reversing a final judgment dismissing a case for lack of jurisdiction, also review the district court's interlocutory denial of a motion to dismiss for failure to state a claim. *Ibid.*; see also *Akin* v. *PAFEC Ltd.*, 991 F.2d 1550, 1563 (11th Cir. 1993) (district court's denial of plaintiff's request for jury trial could not be reviewed after court of appeals reversed grant of summary judgment to defendant, because "the district court's ruling on the jury demand issue bears no relation to the final judgment which forms the basis of our appellate jurisdiction"); accord *Burke* v. *Ernest W. Hahn, Inc.*, 592 F.2d 542, 546 (9th Cir. 1979) ("The denial of a motion for summary judgment is not an appealable order * * * and this is so even where an action is incorrectly dismissed by the district court for lack of subject matter jurisdiction."); *Goodman* v. *McDonnell Douglas Corp.*, 606 F.2d 800, 804 n.11 (8th Cir. 1979) ("The denial of a motion for summary judgment is not an appealable order, and the dismissal on the basis of laches does not convert the denial of summary judgment into a 'final judgment' for purposes of appeal."), cert. denied, 446 U.S. 913 (1980); *Milan Express Co.* v. *Western Surety Co.*, 886 F.2d 783, 785 n.1 (6th Cir. 1989) (on appeal from final judgment dismissing case for lack of subject-matter jurisdiction, court of appeals had no jurisdiction to review denial of class certification).

Some courts have suggested that, when the facts are not in contention and the dispute between the parties involves only issues of law, then a court of appeals, after announcing the proper rule of law and reversing a final judgment

based on the application of an erroneous legal rule by the district court, may direct entry of summary judgment for the appellant. See, *e.g.*, *Swaback* v. *American Information Technologies Corp.*, 103 F.3d 535, 543-544 & n.24 (7th Cir. 1996). This, however, is manifestly not such a case. Here, in light of its conclusion that the judgment in favor of the United States in *Adams* should not be reopened, and its resulting dismissal of the action, the district court denied respondents' motion for summary judgment without reaching the merits of their claim of title. See App., *infra*, 44a. The district court therefore had no occasion to resolve any issues of law or fact concerning respondents' motion for summary judgment. The impropriety of the court of appeals' decision in reaching and resolving the merits of that claim and ordering that title be awarded to respondents is made all the more apparent by several errors underlying the court's conclusion that "the validity of [respondents'] title is a legal certainty." *Id.* at 9a.

The court's decision to quiet title in favor of respondents necessarily rested on the incorrect premise that Professor Baade's affidavit had conclusively resolved all questions regarding both the legal validity of the Boudreau Grant and the chain of title between the Boudreaus and respondents. In fact, the Baade affidavit did not even purport to address the chain of title; even if the Boudreau Grant were valid, that would not necessarily mean that respondents have good title to the lands in question. And as to the Boudreau Grant, while the court of appeals relied on Professor Baade's legal "Memorandum on Title to Horn Island" (R.E. 150-189), which stated a legal conclusion that Bernardo de Galvez had authority in August 1781 to grant Horn Island to Catalina Boudreau

(R.E. 157),[19] that conclusion is in direct conflict with this Court's determination in *Power's Heirs*, 52 U.S. (11 How.) at 579-580, that de Galvez lacked legal authority to issue grants to lands east of the Pearl River on August 1, 1781, the very day he is said to have issued the grant to Catalina Boudreau for Horn Island, which is east of the Pearl River. And even if de Galvez had authority to issue the Boudreau Grant, respondents would still have to establish that the Boudreau Grant was consistent with Spanish law at the time;[20] that Catalina Boudreau's heirs had not forfeited their claim by failing to cultivate or inhabit the land; and that the United States' open and undisturbed claim to the lands as public domain had not effected an

[19] Furthermore, although the court of appeals stated that Professor Baade's conclusions about the validity of the Boudreau Grant were uncontroverted on the summary judgment record (App., *infra*, 8a), Professor Baade himself stated that he had performed an evaluation and determination of "the *legal* effect of * * * the 'Boudreau Grant'" (R.E. 134 (emphasis added)). While Federal Rule of Civil Procedure 56(e) permits a court to rely on unchallenged "facts as would be admissible in evidence," it does not permit a court to give dispositive weight to *legal conclusions* in an affidavit. Rule 56(e) requires that affidavits in support of motions for summary judgment "shall be made on personal knowledge," and also requires an affirmative showing that the affiant "is competent to testify to the matters stated therein." Legal conclusions, therefore, are not within the scope of affidavits offered under Rule 56. See 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2738, at 486-489 (1983).

[20] At the time of the alleged grant of Horn Island to Catalina Boudreau, Spanish grants in the province of Louisiana were governed by the regulations of Governor O'Reilly, dated February 18, 1770. See *Power's Heirs*, 52 U.S. (11 How.) at 576; see generally *Muse* v. *Arlington Hotel Co.*, 68 F. 637 (E.D. Ark. 1895), error dismissed, 168 U.S. 430 (1897). Those regulations included formal requirements of "an actual survey on the ground before the title of the crown was divested, followed by an actual putting the grantee in pedal possession." 68 F. at 640.

adverse possession against Catalina Boudreau's successors in interest.

All those questions were left unresolved by the parties' mutual agreement to the entry of a consent judgment in the earlier suit, and none of them was passed on by the district court in this litigation. Moreover, the court of appeals' ruling that de Galvez' grant to Catalina Boudreau was valid may cloud the United States' title in other parcels of land in the Gulf Islands National Seashore—including those parcels in which the other defendants to the original quiet title action brought by the United States claimed an interest—along with other lands east of the Pearl River, including those at issue in the *Power's Heirs* case. At a minimum, therefore, even if the court of appeals had appellate jurisdiction to review the district court's disposition of respondent's motion for summary judgment based on the Boudreau Grant, it should not itself have passed on the validity of respondents' claim, but should have remanded the case to the district court for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
MARTIN W. MATZEN
WILLIAM B. LAZARUS
Attorneys

OCTOBER 1997

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 95-60625

CHRIS W. BEGGERLY; JAMES R. BEGGERLY; CLARK M. BEGGERLY; VELMA B. GARNER; SUZANNE REED; DAVID REED,
PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

[Filed: May 29, 1997]
[As Corrected on Rehearing and Filed July 28, 1997]

Before: POLITZ, Chief Judge, EMILIO M. GARZA and STEWART, Circuit Judges.

POLITZ, Chief Judge:

The panel substitutes the following for its opinion previously issued:

The Beggerlys appeal the district court's order granting the motion to dismiss by the United States and denying the Beggerlys' cross-motion for summary judgment in which they sought to vacate a consent judgment under which the United States acquired title to property previously held by the

Beggerlys. Concluding that the Beggerlys are entitled to the relief sought, we reverse, and remand.

BACKGROUND

On April 3, 1950 Clark M. Beggerly, Sr., on behalf of his family, bought a portion of Horn Island, offshore in the Gulf of Mexico, at a tax sale in Jackson, Mississippi. On January 8, 1971 Congress enacted legislation authorizing the Department of Interior to establish a federal park on lands that included Horn Island.[1] In 1972 the National Park Service began negotiating with the Beggerlys for the purchase of their property on Horn Island. In October 1975 the Beggerlys entered into a contract to sell the land to the government for $156,500. Subsequently the government canceled the contract contending that because it had never issued a land patent, it was the title owner of Horn Island.

In 1979 the government brought a quiet title action in the Southern District of Mississippi against the Beggerlys and other defendants. During discovery the Beggerlys sought proof of their title, and government officials ostensibly conducted a thorough search of the public land records. The government then formally represented to the Beggerlys and the district court that no part of Horn Island had ever been granted to a private landowner and, as a result of these representations, in 1982 the government persuaded the Beggerlys to accept a settlement agreement it proposed. The district court entered judgment based upon that agreement; the Beggerlys

[1] 16 U.S.C. § 459h.

received $208,175.87 and title was quieted in favor of the United States.[2]

Their disappointment with the results of the settlement led the Beggerlys to mount an exhaustive search for a land patent to support their claim of title. They wrote letters to public officials, made Freedom of Information Act requests, and searched land records in Alabama, Mississippi, Louisiana, and Washington, D.C. Finally, in 1991 the Beggerlys hired a genealogical record specialist who conducted research in the National Archives and discovered the Boudreau Grant which supported the Beggerlys' claim of title. Government officials reportedly had searched the National Archives during the quiet title suit but had not discovered this document and thereafter erroneously advised the court and the Beggerlys that Horn Island had never been privately disposed. The Beggerlys contacted the Bureau of Land Management requesting the issuance of a land patent for Horn Island. The BLM summarily denied their request.

The Beggerlys then filed the instant action on June 1, 1994 seeking to set aside the consent judgment and to recover just compensation. The government moved to dismiss the complaint, invoking Fed.R.Civ.P. 12(b)(6) and 12(b)(1). The Beggerlys filed a cross-motion for summary judgment and filed an amended motion to add the Tucker Act[3] and the Quiet Title Act[4] as jurisdictional bases. The district court granted the government's motion to dismiss and

[2] *United States v. Adams*, No. S79-0338(R) (S.D. Miss. Dec. 3, 1982).

[3] 28 U.S.C. § § 1346, 1491.

[4] 28 U.S.C. § 2409a.

denied the Beggerlys' cross-motion for summary judgment and motion to amend. The Beggerlys timely appealed.

ANALYSIS

1. *Sovereign Immunity*

The government contends that sovereign immunity bars the Beggerlys from proceeding with an independent action in equity. The government relies on *Zegura v. United States*[5] in which we held that sovereign immunity barred a bill of review brought to vacate a prior judgment obtained by the United States. The Eleventh Circuit viewed *Zegura* as controlling authority for the proposition that an independent action could not be brought against the government absent a waiver of sovereign immunity.[6] We are not so persuaded and do not find *Zegura* as controlling herein. *Zegura* dealt only with a bill of review, which is a type of equitable action that has been replaced by the motions enumerated in Fed.R.Civ.P. 60(b). Although an independent action in equity is similar to a bill of review and its modern successors—the Rule 60(b) motions—it is nonetheless a different action. Rule 60(b) makes the distinction clear, stating that it does not "limit the power of a court to entertain an independent action." We therefore conclude that *Zegura* does not control in the independent action context.

We have held that an independent action filed in the same court that rendered the original judgment is a continuation of the original action for purposes of

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[5] 104 F.2d 34 (5th Cir.), *cert. denied*, 308 U.S. 586 (1939).

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subject matter jurisdiction.[7] It would be anomalous to torpedo a party bringing the independent action with a plea of sovereign immunity when the action is in reality a continuation of the original lawsuit in which jurisdiction was not an issue. To allow the government to use sovereign immunity as a shield where it previously has invoked the court's jurisdiction and prevailed in an action based upon its misrepresentations, negligence, or mistake would do unacceptable violence to our basic notions of justice. We therefore agree with our colleagues in the Second Circuit and now conclude and hold that governmental consent is not required to bring an independent action in the same court as the original action.[8]

2. *The Independent Action*

The elements of an independent action are:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.[9]

The Beggerlys have satisfied these elements. We now hold that the district court erred as a matter of law in denying the Beggerlys' action to vacate the

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[7] *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 213 F.2d 702 (5th Cir. 1954).

[8] *Weldon v. United States*, 70 F.3d 1 (2d Cir. 1995).

[9] *Bankers Mortgage Co. v. United States*, 423 F.2d 73 (5th Cir.) (quoting *National Sur. Co. v. State Bank*, 120 F. 593, 599 (8th Cir.1903)), *cert. denied*, 90 S.Ct. 2242 (1970).

consent judgment. Crucial to that determination is our conclusion that the district court erred in failing to recognize the validity of the Boudreau Grant. That document is an English translation of a 1781 Spanish land grant in which the Governor General of Spanish Louisiana conveyed Horn Island to Catarina Boudreau. Although the available document is not the original grant, it is the only copy available, presumably because a fire destroyed the Spanish West Florida archives where the original Spanish version would have been stored. The Supreme Court has held that a certified translation of a Spanish land grant may be used to prove the existence of a grant where the original cannot be found or has been destroyed.[10] We therefore find and conclude that the English translation is the best evidence of the original grant and is admissible to prove its existence.

The government contended at oral argument that the Boudreau Grant was merely an application for a land patent. In the early 19th century Congress established land commissions to organize the private claims of landowners, in what are now the states of Louisiana, Mississippi, Alabama, and Florida, who had acquired their property from England, France, or Spain. Heirs of Catarina Boudreau presented the Boudreau Grant to the land commissioner for claims east of the Pearl River. It was not accepted. The land commissioners were responsible for ascertaining titles and claims but did not have the authority to adjudicate title. The controlling statute required that the commissioners submit claims to Congress

[10] *United States v. Delespine's Heirs*, 37 U.S. (12 Pet.) 654 (1838).

for final action.[11] We must therefore conclude that the land commissioner's refusal to accept the application did not conclusively determine that Horn Island belonged to the United States.

It is abundantly clear that the land commissioners did not have the authority to confiscate property rightfully owned by private individuals. It is well-settled that, absent a specific congressional act, land validly granted by a foreign nation remained privately owned after the United States acquired political control of the subject area. Chief Justice John Marshall taught:

> The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed.[12]

Articles II and III of the treaty consummating the Louisiana Purchase, under which the United States acquired property south of the 31st parallel where Horn Island is located,[13] expressly protected the rights of private landowners. We consider it beyond serious debate that if the Boudreau Grant was a valid

[11] Act of April 25, 1812, 2 Stat. 713; *see generally United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

[12] *Percheman* at 86-87.

[13] *United States v. Louisiana*, 363 U.S. 1 (1960); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), *overruled on other grounds by Percheman*.

land grant under the Spanish law of 1781, then Horn Island remained private property after the Louisiana Purchase. If, however, the grant was incomplete or invalid under Spanish law, then the land commissioner was justified in his rejection. We inquire, therefore, as to the validity of the Boudreau Grant under Spanish law at the time it was made. The summary judgment record contains an affidavit by Professor Hans Baade, offered by the Beggerlys as evidence that the Boudreau Grant was complete and valid under the Spanish law of 1781. On the record before us the Boudreau Grant vested complete and valid title in Catarina Boudreau. On that record, therefore, we must conclude that the property at issue herein remained privately owned after the Louisiana Purchase and did not enter the public domain of the United States until the misrepresentation-based consent judgment of 1982.

The government possessed a document that was vital to the Beggerlys' claim of title to the land they had acquired on Horn Island. Notwithstanding, it represented to the Beggerlys and to the district court that no evidence existed that Horn Island had ever been privately owned. This representation precipitated the Beggerlys' involuntary settlement of the government's lawsuit. Their inability to prove their title was directly caused by the government's failure to produce the grant and its misrepresentation that no private disposal had ever been made. Equity permits us to correct injustice in extraordinary and unusual circumstances such as are here presented. We exercise that authority and as to the Beggerlys

set aside the challenged consent judgment as null and void *ab initio*.[14]

3. *Quiet Title Act Claim*

The Beggerlys filed a motion to amend their complaint to claim relief under the Quiet Title and Tucker Acts. The district court denied that motion. We read the Beggerlys' complaint and motion for summary judgment as stating alternative causes of action. Although the district court did not have jurisdiction over an inverse condemnation action under the Tucker Act,[15] it did have jurisdiction to adjudicate title under the Quiet Title Act. We conclude that the district court abused its discretion and should have allowed the Beggerlys to amend their complaint because "[t]he requested amendment would have done no more than state an alternative jurisdictional basis for recovery upon the facts previously alleged."[16]

The record reflects that the Beggerlys legally acquired a part of Horn Island in a tax sale. Because we have set aside the earlier judgment as to the Beggerlys and have found that the United States has no legitimate claim to the land, the validity of the Beggerlys' title is a legal certainty. The government maintains, however, that a claim under the Quiet Title Act is barred unless it is commenced within 12 years of the date on which it accrued.[17] A claim is deemed to accrue on the date the plaintiff knows or

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[14] We note that there are no fixed time limitations on bringing an independent action in equity. *In re West Texas Mktg. Corp.*, 12 F.3d 497 (5th Cir. 1994).

[15] *See* 28 U.S.C. §§ 1346, 1491 (vesting exclusive jurisdiction in the Federal Court of Claims for claims exceeding $10,000).

[16] *Miller v. Stanmore*, 636 F.2d 986, 990 (5th Cir. 1981).

[17] 28 U.S.C. § 2409a(g).

should have known about the claim of the United States.[18] The Beggerlys knew about the claim at the earliest in 1976 when the government ceased contract negotiations with them for the purchase of their Horn Island property. More than 12 years passed before the Beggerlys commenced the current action; however, a statute of limitations may be tolled on equitable grounds. "Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights."[19] On the record before us the government may not benefit from the limitations period, especially in light of the diligence displayed by the Beggerlys in seeking the truth and pursuing their rights, which resulted in their discovering a grant that apparently not even custodians of the public land records could or would locate. We conclude that the limitations period was tolled from the time the Beggerlys began searching for evidence of a private disposal during the original quiet action until they discovered the Boudreau Grant and, thus, that their action manifestly was filed within the 12-year limitations period.

We remand to the district court so that it may enter judgment quieting title in favor of the Beggerlys. Under 28 U.S.C. § 2409a(b) the United States has the option of delivering possession of the 729 acres claimed by the Beggerlys or it may elect to retain possession thereof and pay the Beggerlys just com-

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[18] *Id.*

[19] *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996). Equitable tolling may be applied against the United States. *Irwin v. Department of Veterans Affairs*, 111 S.Ct. 453 (1990).

pensation for same. The district court is to take into account the compensation of $208,175.87 received by the Beggerlys in the 1982 settlement. The judgment of the district court is REVERSED and judgment is RENDERED in favor of the Beggerlys and this cause is REMANDED for further proceedings consistent herewith.

EMILIO M. GARZA, Circuit Judge, dissenting:

I agree with much of today's majority opinion. I agree with the majority that the complaint is not a motion under Fed. R. Civ. P. 60(b)(1)-(6), and that it should more properly be considered an independent action in equity, since Beggerly explicitly invoked the equitable jurisdiction of the district court in his complaint. I agree with the majority that the district court erred in dismissing the action as untimely, because there is no fixed limitations period for such equitable actions. And finally, I agree with the majority that the equities of this case favor Beggerly and his family. However, because we do not have jurisdiction to provide such relief, I must part company with the majority. As judges, we have equitable discretion to do justice within the limits of the law, but we can go no further. In this case, the government has not waived its sovereign immunity to suit, which bars our jurisdiction to provide relief.

As an initial matter, I would not treat an independent action in equity as a "continuation" of the underlying suit with ancillary jurisdiction from the original action. In a similar context, the Supreme Court appears to have foreclosed the notion of ancillary jurisdiction in cases such as this one, involving a challenge to a settlement agreement in federal court. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.

375, 380, 114 S. Ct. 1673, 1676, 128 L. Ed. 2d 391 (1994) ("No case of ours asserts, nor do we think the concept of limited federal jurisdiction permits us to assert, ancillary jurisdiction over any agreement that has as part of its consideration the dismissal of a case before a federal court.").

Furthermore, the Fifth Circuit has long held that independent actions must have jurisdiction independent of the judgments they challenge. *Bankers Mortgage Trust Co. v. United States*, 423 F.2d 73, 78 (5th Cir.), *cert. denied*, 399 U.S. 927, 90 S. Ct. 2242, 26 L. Ed. 2d 793 (1970); *Jones v. Watts*, 142 F.2d 575 (5th Cir.), *cert. denied*, 323 U.S. 787, 65 S. Ct. 310, 89 L. Ed. 628 (1944); *Zegura v. United States*, 104 F.2d 34, 35 (5th Cir.), *cert. denied*, 308 U.S. 586, 60 S. Ct. 109, 84 L. Ed. 490 (1939).[1]

West Virginia Oil & Gas v. George E. Breece Lumber, cited by the majority, appears to have created an exception to this general rule. *West Virginia*

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[1] I recognize that there is a conflict among the other circuits regarding whether independent actions require independent jurisdiction. *Compare Weldon v. United States*, 70 F.3d 1, 4 (2d Cir. 1995) (holding that independent actions are ancillary to original suit) and *Crosby v. Mills*, 413 F.2d 1273, 1275 (10th Cir. 1969) (same) *with In re Hunter*, 66 F.3d 1002, 1005-06 (9th Cir. 1995) (rejecting notion of ancillary jurisdiction in independent actions); *United States v. Timmons*, 672 F.2d 1373, 1378-79 (11th Cir. 1982) (same); *and Andrade v. United States*, 485 F.2d 660, 664 (Ct. Cl. 1973) (same), *cert. denied*, 419 U.S. 831, 95 S. Ct. 55, 42 L. Ed. 2d 57 (1974). *See also* 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice & Procedure: Civil § 2868 at 403 (2d ed. 1995) (supporting notion of ancillary jurisdiction, citing generally *Pacific R. Co. v. Missouri Pac. Ry. Co.*, 111 U.S. 505, 522, 4 S. Ct. 583, 28 L. Ed. 498 (1884)); 7 James W. Moore, Moore's Federal Practice ¶ 60.38[1], at 60-399 (2d ed. 1995) (same).

Oil was a federal diversity case in which the parties to the original action were diverse, but after judgment, sales of the property at stake defeated complete diversity. 213 F.2d 702, 704 (5th Cir. 1954). In *West Virginia Oil*, we held that the district court had continuing diversity jurisdiction to correct errors in the original judgment. *Id.* at 706-07. The "ancillary jurisdiction" reasoning of *West Virginia Oil* has little or no precedential value in light of the Supreme Court's holding in *Kokkonen* or in light of our prior cases, reflected most recently in *Bankers Mortgage*, in which we required that an independent action be "founded upon an independent and substantive equitable jurisdiction." 423 F.2d at 78.

Moreover, to the extent that *West Virginia Oil* has any value as precedent, the case is inapposite here because it is on a completely different jurisdictional footing. *West Virginia Oil* was a case in which the parties could not review the judgment in federal court without ancillary jurisdiction. Beggerly, on the other hand, could have pursued this suit under several different statutes conferring federal jurisdiction independent of that in the original action. The federal courts would have had independent jurisdiction over a timely action under the Quiet Title Act, 28 U.S.C. § 2409a; the Tucker Act, 28 U.S.C. § 1491; and probably general federal question jurisdiction under 28 U.S.C. § 1331 (putting sovereign immunity to one side for the moment). Because there is no need to assert ancillary jurisdiction to review the underlying settlement in federal court, *West Virginia Oil* is not

on point, even to the extent that it was ever good law in the first place.[2]

My concern over the characterization of this suit as independent or ancillary is not as serious as my

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[2] Our *West Virginia Oil* opinion relies solely on an apparent misreading of Supreme Court precedent. In *West Virginia Oil*, the court confused the history of independent actions and the common law predecessors to the separate actions of Fed. R. Civ. P. 60(b). Independent actions are distinct, and "should under no circumstances be confused with ancillary common law and equitable remedies, or their modern substitute, the 60(b) motion." *Bankers Mortgage*, 423 F.2d at 78. The *West Virginia Oil* court simply cited a Supreme Court case that found ancillary jurisdiction for the precursor to Rule 60(b) motions, and held that there was similar ancillary jurisdiction in independent actions.

The *West Virginia Oil* court relied on *Pacific Railroad of Missouri v. Missouri Pacific Railway Co.*, 111 U.S. 505, 522, 4 S. Ct. 583, 592, 28 L. Ed. 2d 498 (1884), which involved a bill in equity to vacate a judgment on the basis of fraud. The bill in equity in that case was a bill of review (one of the forebears of Rule 60(b)), not an independent action in equity. *Zegura*, 104 F.2d at 35 (characterizing the bill in *Pacific Railroad* as a "bill of review"). Therefore *Pacific Railroad* has little or no precedential force for independent actions. A bill of review, like a Rule 60(b) motion, had to be brought in the court that rendered judgment and was essentially a request that the court reopen the judgment to reverse or correct a final decree. Wright, Miller & Kane, Federal Practice & Procedure: Civil § 2867 at 394. The unremarkable fact that a motion to reopen a judgment enjoys ancillary jurisdiction therefore should not disturb our precedents holding that independent actions in equity are founded upon an independent and substantive equitable jurisdiction. *Bankers Mortgage*, 423 F.2d at 78. I agree with the *Bankers Mortgage* court, and apparently the Supreme Court in *Kokkonen*, that it is important not to confuse the two conceptually distinct avenues for review.

other concerns: waiver of sovereign immunity and the proper reach of the majority opinion.

The United States is, of course, immune from suit without its consent, *Loeffler v. Frank*, 486 U.S. 549, 554, 108 S. Ct. 1965, 1969, 100 L. Ed. 2d 549 (1988), and we are to construe waivers of sovereign immunity "strictly in favor of the sovereign." *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615, 112 S. Ct. 1627, 1633, 118 L. Ed. 2d 255 (1992). Beggerly can cite no statutory waiver of sovereign immunity in this case, either in the original action or in the independent action. The majority bypasses the question of sovereign immunity by holding that "governmental consent is not required to bring an independent action in the same court as the original action[,]" citing the Second Circuit's opinion in *Weldon v. United States*, 70 F.3d 1, 4 (2d Cir. 1995). Regardless of the equities of any individual case, governmental consent is always required as a prerequisite to federal jurisdiction. *Loeffler*, 486 U.S. at 554.

The Second Circuit's opinion in *Weldon* is not to the contrary. Although the Second Circuit in *Weldon* agrees with the majority that independent actions are "continuations" of the original actions they challenge, the court does not claim that waiver of sovereign immunity is unnecessary. In *Weldon*, the parties sued under the Federal Tort Claims Act in the original suit, which constituted a statutory waiver of sovereign immunity. 70 F. 3d at 2. The *Weldon* court held that, because the independent action was essentially a continuation of the original suit, the government's waiver of sovereign immunity in the original action should continue to bind the United States in the subsequent challenge. *Id.* *Weldon* does not suggest that waiver is unnecessary,

only that it may be continued from the original suit. So even if we were to find in the instant case that independent actions should be considered a continuation of the original actions they challenge (a point I still dispute), there would still be no waiver of sovereign immunity in the original action for us to continue. Of course, we cannot equitably waive sovereign immunity on behalf of the government; therefore we do not have jurisdiction to consider this suit.[3]

My final concern is that the majority reaches issues not before us in this opinion. Even if there were a waiver of sovereign immunity in this case, we would have no jurisdiction to reach the merits of Beggerly's cross motion for summary judgment, the validity of the Boudreau grant, or the ownership of Horn Island, as the majority does. These issues are fraught with difficult fact questions that must be decided by the district court, which alone has jurisdiction to consider them. Moreover, the majority should not have reached those issues on the incomplete summary judgment record before us, but instead should have remanded them to the district court. Therefore I respectfully dissent.

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[3] Presumably a timely challenge to the original action under the Quiet Title Act or the Tucker Act, each of which involves a statutory waiver of immunity, would not suffer from this infirmity of the independent action in equity.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60625

CHRIS W. BEGGERLY; JAMES R. BEGGERLY;
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SUZANNE REED; DAVID REED,
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POLITZ, Chief Judge:

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ANALYSIS

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We have held that an independent action filed in the same court that rendered the original judgment is a continuation of the original action for purposes of subject matter jurisdiction.[7] It would be anomalous to torpedo a party bringing the independent action with

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a plea of sovereign immunity when the action is in reality a continuation of the original lawsuit in which jurisdiction was not an issue. To allow the government to use sovereign immunity as a shield where it previously has subjected itself to the court's jurisdiction and prevailed based upon its misrepresentations, negligence, or mistake would do unacceptable violence to our basic notions of justice. We therefore agree with our colleagues in the Second Circuit and now conclude and hold that governmental consent is not required to bring an independent action in the same court as the original action.[8]

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The Beggerlys have satisfied these elements. We now hold that the district court erred as a matter of law in denying the Beggerlys' action to vacate the consent judgment. Crucial to that determination is our conclusion that the district court erred in failing to recognize the validity of the Boudreau Grant. That document is an English translation of a 1781 Spanish

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land grant in which the Governor General of Spanish Louisiana conveyed Horn Island to Catarina Boudreau. Although the available document is not the original grant, it is the only copy available, presumably because a fire destroyed the Spanish West Florida archives where the original Spanish version would have been stored. The Supreme Court has held that a certified translation of a Spanish land grant may be used to prove the existence of a grant where the original cannot be found or has been destroyed.[10] We therefore find and conclude that the English translation is the best evidence of the original grant and is admissible to prove its existence.

At oral argument the government characterized the Boudreau Grant as an application for confirmation of a patent. That must be viewed as a misstatement of law. After the Louisiana Purchase, a procedure was established whereby landowners who had acquired property from England, France, or Spain could apply to the United States for a land patent by presenting the grant they had received from the sovereign grantor. Heirs of Catarina Boudreau presented the Boudreau Grant to the land commissioner for claims east of the Pearl River. The government suggests that because the commissioner did not confirm the application, the United States refused to relinquish title to Horn Island. That argument ignores Supreme Court precedent to the contrary. In *United States v. Percheman*, Chief Justice John Marshall overruled a prior interpretation of the Treaty of Amity with Spain and held that private land grants by Spain in East and West Florida were to be treated as

[10] *United States v. Delespine's Heirs*, 37 U.S. (12 Pet.) 654 (1838).

confirmed land patents under United States law.[11] When the grants were valid under Spanish law and were granted while Spain rightfully possessed the land, the United States recognized the claims of private landowners as a matter of law.[12] In the case at bar the government does not challenge the validity of the grant under the Spanish law of 1781, nor is there any doubt that Spain owned Horn Island at the time it made the grant. Accordingly, after the Louisiana Purchase, Horn Island did not become property of the United States but, rather, belonged to the successors in interest of Catarina Boudreau.

The government possessed a document proving that the United States never had title to Horn Island. Notwithstanding, it represented to the Beggerlys and to the district court that no such document existed, leading to the Beggerlys' involuntary settlement with the government. Their inability to prove their title was directly caused by the government's misfiling of the grant and its misrepresentation that no private disposal had ever been made. Equity permits us to correct injustice in extraordinary and unusual circumstances such as are here presented. We exercise that authority and set aside the challenged consent judgment as null and void *ab initio*.[13]

[11] 32 U.S. (7 Pet.) 51 (1833) (overruling in part *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829)); *see also United States v. Postal*, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

[12] *See Garcia v. Lee*, 37 U.S. (12 Pet.) 511 (1838); *United States v. Arrendondo*, 31 U.S. (6 Pet.) 691 (1832).

[13] We note that there are no fixed time limitations on bringing an independent action in equity. *In re West Texas Mktg. Corp.*, 12 F.3d 497 (5th Cir. 1994).

3. *Quiet Title Act Claim*

The Beggerlys filed a motion to amend their complaint to claim relief under the Quiet Title and Tucker Acts. The district court denied that motion. Although the district court did not have jurisdiction to hear the Tucker Act claim,[14] it did have jurisdiction over the Quiet Title Act. We conclude that the district court abused its discretion and should have allowed the Beggerlys to amend their complaint because "[t]he requested amendment would have done no more than state an alternative jurisdictional basis for recovery upon the facts previously alleged."[15]

The record reflects that the Beggerlys legally acquired Horn Island in a tax sale. Because we have set aside the earlier judgment and have found that the United States has no legitimate claim to the land, the validity of the Beggerlys' title is a legal certainty. The government maintains, however, that a claim under the Quiet Title Act is barred unless it is commenced within 12 years of the date on which it accrued.[16] A claim is deemed to accrue on the date the plaintiff knows or should have known about the claim of the United States.[17] The Beggerlys knew about the claim in 1979 when the United States filed suit, and more than 12 years passed before the Beggerlys commenced the current action. A statute of limitations, however, may be tolled on equitable grounds. "Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of

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[14] *See* 28 U.S.C. §§ 1346, 1491 (vesting exclusive jurisdiction in the Federal Court of Claims for claims exceeding $10,000).

[15] *Miller v. Stanmore*, 636 F.2d 986, 990 (5th Cir. 1981).

[16] 28 U.S.C. § 2409a(g).

[17] *Id.*

action or is prevented in some extraordinary way from asserting his rights."[18] On the record before us the government may not benefit from the limitations period, especially in light of the diligence displayed by the Beggerlys in seeking the truth and pursuing their rights, which resulted in their discovering a grant that apparently not even custodians of the public land records could locate. We conclude that the limitations period was tolled until the Beggerlys discovered the Boudreau Grant and, thus, that their action manifestly was filed within the 12-year limitations period.

We remand to the district court so that it may enter judgment quieting title in favor of the Beggerlys and fashion an appropriate remedy, taking into account the compensation of $208,175.87 received by the Beggerlys in 1982. The judgment of the district court is REVERSED and judgment is RENDERED in favor of the Beggerlys and this cause is REMANDED for further proceedings consistent herewith.

EMILIO M. GARZA, Circuit Judge, dissenting:

I agree with much of today's majority opinion. I agree with the majority that the complaint is not a motion under Fed. R. Civ. P. 60(b)(1)-(6), and that it should more properly be considered an independent action in equity, since Beggerly explicitly invoked the equitable jurisdiction of the district court in his complaint. I agree with the majority that the district court erred in dismissing the action as untimely,

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[18] *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996). Equitable tolling may be applied against the United States. *Irwin v. Department of Veterans Affairs*, 111 S.Ct. 453 (1990).

because there is no fixed limitations period for such equitable actions. And finally, I agree with the majority that the equities of this case favor Beggerly and his family. However, because we do not have jurisdiction to provide such relief, I must part company with the majority. As judges, we have equitable discretion to do justice within the limits of the law, but we can go no further. In this case, the government has not waived its sovereign immunity to suit, which bars our jurisdiction to provide relief.

As an initial matter, I would not treat an independent action in equity as a "continuation" of the underlying suit with ancillary jurisdiction from the original action. In a similar context, the Supreme Court appears to have foreclosed the notion of ancillary jurisdiction in cases such as this one, involving a challenge to a settlement agreement in federal court. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380, 114 S. Ct. 1673, 1676, 128 L. Ed. 2d 391 (1994) ("No case of ours asserts, nor do we think the concept of limited federal jurisdiction permits us to assert, ancillary jurisdiction over any agreement that has as part of its consideration the dismissal of a case before a federal court.").

Furthermore, the Fifth Circuit has long held that independent actions must have jurisdiction independent of the judgments they challenge. *Bankers Mortgage Trust Co. v. United States*, 423 F.2d 73, 78 (5th Cir.), *cert. denied*, 399 U.S. 927, 90 S. Ct. 2242, 26 L. Ed. 2d 793 (1970); *Jones v. Watts*, 142 F.2d 575 (5th Cir.), *cert. denied*, 323 U.S. 787, 65 S. Ct. 310, 89 L. Ed. 628 (1944); *Zegura v. United States*, 104 F.2d 34,

35 (5th Cir.), *cert. denied*, 308 U.S. 586, 60 S. Ct. 109, 84 L. Ed. 490 (1939).[1]

West Virginia Oil & Gas v. George E. Breece Lumber, cited by the majority, appears to have created an exception to this general rule. *West Virginia Oil* was a federal diversity case in which the parties to the original action were diverse, but after judgment, sales of the property at stake defeated complete diversity. 213 F.2d 702, 704 (5th Cir. 1954). In *West Virginia Oil*, we held that the district court had continuing diversity jurisdiction to correct errors in the original judgment. *Id.* at 706-07. The "ancillary jurisdiction" reasoning of *West Virginia Oil* has little or no precedential value in light of the Supreme Court's holding in *Kokkonen* or in light of our prior cases, reflected most recently in *Bankers Mortgage*, in which we required that an independent action be "founded upon an independent and substantive equitable jurisdiction." 423 F.2d at 78.

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[1] I recognize that there is a conflict among the other circuits regarding whether independent actions require independent jurisdiction. *Compare Weldon v. United States*, 70 F.3d 1, 4 (2d Cir. 1995) (holding that independent actions are ancillary to original suit) and *Crosby v. Mills*, 413 F.2d 1273, 1275 (10th Cir. 1969) (same) *with In re Hunter*, 66 F.3d 1002, 1005-06 (9th Cir. 1995) (rejecting notion of ancillary jurisdiction in independent actions); *United States v. Timmons*, 672 F.2d 1373, 1378-79 (11th Cir. 1982) (same); *and Andrade v. United States*, 485 F.2d 660, 664 (Ct. Cl. 1973) (same), *cert. denied*, 419 U.S. 831, 95 S. Ct. 55, 42 L. Ed. 2d 57 (1974). *See also* 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice & Procedure: Civil § 2868 at 403 (2d ed. 1995) (supporting notion of ancillary jurisdiction, citing generally *Pacific R. Co. v. Missouri Pac. Ry. Co.*, 111 U.S. 505, 522, 4 S. Ct. 583, 28 L. Ed. 498 (1884)); 7 James W. Moore, Moore's Federal Practice ¶ 60.38[1], at 60-399 (2d ed. 1995) (same).

Moreover, to the extent that *West Virginia Oil* has any value as precedent, the case is inapposite here because it is on a completely different jurisdictional footing. *West Virginia Oil* was a case in which the parties could not review the judgment in federal court without ancillary jurisdiction. Beggerly, on the other hand, could have pursued this suit under several different statutes conferring federal jurisdiction independent of that in the original action. The federal courts would have had independent jurisdiction over a timely action under the Quiet Title Act, 28 U.S.C. § 2409a; the Tucker Act, 28 U.S.C. § 1491; and probably general federal question jurisdiction under 28 U.S.C. § 1331 (putting sovereign immunity to one side for the moment). Because there is no need to assert ancillary jurisdiction to review the underlying settlement in federal court, *West Virginia Oil* is not on point, even to the extent that it was ever good law in the first place.[2]

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[2] Our *West Virginia Oil* opinion relies solely on an apparent misreading of Supreme Court precedent. In *West Virginia Oil*, the court confused the history of independent actions and the common law predecessors to the separate actions of Fed. R. Civ. P. 60(b). Independent actions are distinct, and "should under no circumstances be confused with ancillary common law and equitable remedies, or their modern substitute, the 60(b) motion." *Bankers Mortgage*, 423 F.2d at 78. The *West Virginia Oil* court simply cited a Supreme Court case that found ancillary jurisdiction for the precursor to Rule 60(b) motions, and held that there was similar ancillary jurisdiction in independent actions.

The *West Virginia Oil* court relied on *Pacific Railroad of Missouri v. Missouri Pacific Railway Co.*, 111 U.S. 505, 522, 4 S. Ct. 583, 592, 28 L. Ed. 2d 498 (1884), which involved a bill in equity to vacate a judgment on the basis of fraud. The bill in equity in that case was a bill of review (one of the forebears of

My concern over the characterization of this suit as independent or ancillary is not as serious as my other concerns: waiver of sovereign immunity and the proper reach of the majority opinion. The United States is, of course, immune from suit without its consent, *Loeffler v. Frank*, 486 U.S. 549, 554, 108 S. Ct. 1965, 1969, 100 L. Ed. 2d 549 (1988), and we are to construe waivers of sovereign immunity "strictly in favor of the sovereign." *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615, 112 S. Ct. 1627, 1633, 118 L. Ed. 2d 255 (1992). Beggerly can cite no statutory waiver of sovereign immunity in this case, either in the original action or in the independent action. The majority bypasses the question of sovereign immunity by holding that "governmental consent is not required to bring an independent action in the same court as the original action[,]" citing the Second Circuit's opinion in *Weldon v. United States*, 70 F.3d 1, 4 (2d Cir. 1995). Regardless of the equities of any individual case, governmental consent is always re-

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Rule 60(b)), not an independent action in equity. *Zegura*, 104 F.2d at 35 (characterizing the bill in *Pacific Railroad* as a "bill of review"), therefore it has little or no precedential force for independent actions. A bill of review, like a Rule 60(b) motion, had to be brought in the court that rendered judgment and was essentially a request that the court reopen the judgment to reverse or correct a final decree. Wright, Miller & Kane, Federal Practice & Procedure: Civil § 2867 at 394. The unremarkable fact that a motion to reopen a judgment enjoys ancillary jurisdiction therefore should not disturb our precedents holding that independent actions in equity are founded upon an independent and substantive equitable jurisdiction. *Bankers Mortgage*, 423 F.2d at 78. I agree with the *Bankers Mortgage* court, and apparently the Supreme Court in *Kokkonen*, that it is important not to confuse the two conceptually distinct avenues for review.

quired as a prerequisite to federal jurisdiction. *Loeffler*, 486 U.S. at 554.

The Second Circuit's opinion in *Weldon* is not to the contrary. Although the Second Circuit in *Weldon* agrees with the majority that independent actions are "continuations" of the original actions they challenge, the court does not claim that sovereign immunity is unnecessary. In *Weldon*, the parties sued under the Federal Tort Claims Act in the original suit, which constituted a statutory waiver of sovereign immunity. 70 F. 3d at 2. The *Weldon* court held that, because the independent action was essentially a continuation of the original suit, the government's waiver of sovereign immunity in the original action should continue to bind the United States in the subsequent challenge. *Id.* *Weldon* does not suggest that waiver is unnecessary, only that it may be continued from the original suit. So even if we were to find in the instant case that independent actions should be considered a continuation of the original actions they challenge (a point I still dispute), there was no waiver of sovereign immunity in the original action for us to continue. Of course, we cannot equitably waive sovereign immunity on behalf of the government; therefore we do not have jurisdiction to consider this suit.[3]

My final concern is that the majority reaches issues not before us in this opinion. Even if there were a waiver of sovereign immunity in this case, we would have no jurisdiction to reach the merits of

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[3] Presumably a timely challenge to the original action under the Quiet Title Act or the Tucker Act, each of which involves a statutory waiver of immunity, would not suffer from this infirmity of the independent action in equity.

Beggerly's cross motion for summary judgment, the validity of the Boudreau grant, or the ownership of Horn Island, as the majority does. These issues are fraught with difficult fact questions that must be decided by the district court, which alone has jurisdiction to consider them. Moreover, the majority should not have reached those issues on the incomplete summary judgment record before us. Therefore I respectfully dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. 1:94-CV-264RR

CHRIS BEGGERLY, ET AL., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Aug. 17, 1995]

MEMORANDUM ORDER

This matter is before the Court on Defendant's Motion to Dismiss and Plaintiffs' Motion for Summary Judgment.

Background

On April 3, 1950, Clark M. Beggerly Sr. (now deceased) purchased for $51.20 approximately 626 acres on Horn Island[1] at a delinquent-tax sale at the Jackson County Courthouse. **See** Complaint at 2-3; Plaintiffs' Exh. A. At the same sale, Beggerly and a friend, A.E. Hurd, purchased for $31.25 approximately 225 acres on Horn Island, which they later divided.

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[1] Horn Island is located in the Gulf of Mexico approximately 13 miles southwest of Pascagoula, Mississippi. The island is approximately 14 miles in length and 1/2 to 3/4 mile in width.

See Complaint at 3; Plaintiffs' Exh. B. This division left Beggerly with two tracts—the 626-acre tract and a 103-acre tract (approximation). **See** Plaintiffs' Memorandum Brief in Support of Motion for Summary Judgment at 1 (hereinafter "Plaintiffs' Brief"); Defendant's Sur-Response at Exh. A. Through conveyances, Beggerly's children (hereinafter "Beggerly" unless otherwise noted) inherited the property in 1971. **See** Plaintiffs' Exh. 3, at 2 (Affidavit of Chris Beggerly).

In that same year, the United States Congress established the Gulf Islands National Seashore "[i]n order to preserve for public use and enjoyment certain areas possessing outstanding natural, historic, and recreational values." 16 U.S.C. sec. 459(h). This national seashore would include the barrier islands of Ship, Petit Bois, and Horn upon acquisition through purchase or other necessary means. **Id.**

In 1974, the National Park Service ("NPS") offered Beggerly $156,500.00 for the 626-acre tract based upon an appraisal of $156,000.00. Beggerly accepted the offer. **See** United States' Memorandum in Support of Motion to Dismiss at 1 (hereinafter "United States' Memorandum"); Plaintiffs' Exh. 3, at 7.[2] But the deal

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[2] Chris Beggerly notes that the offer concerned only his brother, in whose name the 626-acre tract was titled:

> After three or four hours of talking and going back and forth, a deal was reached for them (U.S. Government) to buy Raleigh's part of the property . . . . Raleigh signed a contract to sell and I witnessed it . . . . Before going to this meeting I had talked with Raleigh about holding out, but he . . . had decided that he needed to get rid of this problem and not have to face the on-going bother that was caused by dealing with the government with this land. As I said all along, we have always

fell through after NPS learned through an "exhaustive search of the records of the [U.S. Department of Interior] Bureau of Land Management's Eastern States Office" that Beggerly's property had never been patented by the United States Government "and had at all times been the property of the United States." **See** United States' Memorandum at 1-2. Thus, in 1979, the United States filed a Complaint to quiet title.[3] **See** Defendant's Exh. A. Three years later, the United States and Beggerly reached a settlement. The United States paid Beggerly $208,175.87. **Id.** at 2. The United States based its offer on appraisals for the 626-acre tract ($156, 500.00) and the 103-acre tract ($27,125.00); the offer also accounted for Beggerly's attorney's fees and other costs. **See** Defendant's Sur-Response at Exh. "A."

Chris Beggerly explains why the family agreed to settle:

> As we got close to trial I thought we had a good case, but [James] Martin [his attorney] told us that we would not be able to win because we could not prove that we had good patents. The government came up with some money and everybody decided to settle. I didn't want any part of it, but finally had to agree with my lawyer told me I had no choice.

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worked together and once I realized that's what was best for him, then that suited me.

See Plaintiffs' Exh. 3, at 7.

[3] The quiet-title action involved numerous defendants in addition to Beggerly. **See** United States' Exh. A (**United States v. Adams, et. al.**).

See Plaintiff's Exh. 3, at 10.[4]

In accordance with the settlement terms, Magistrate Judge John M. Roper issued the "Judgment and Order":

> This matter having come before the Court for a hearing and the Court having considered the evidence presented and the terms of a stipulation for Settlement . . . ;
>
> IT IS ORDERED that judgment is hereby entered in favor of the United States, and title to all lands on Horn [Island] . . . is quieted in the United States . . . ;
>
> FURTHER ORDERED that all defendants and their heirs are permanently enjoined from asserting any adverse claims to the subject property . . . ;
>
> FURTHER ORDERED that the United States has title in fee simple absolute to and full rights of possession of the subject property.

See Defendant's Exh. C.

Judge Roper's Order notwithstanding, Beggerly continued to research whether a patent had ever been issued for the Horn Island property.[5] In 1994,

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[4] According to the Complaint, Beggerly decided to settle upon "having no hope of producing the all important grant or patent by the trial date" and "[realiz[ing] the futility of going to trial." **See** Complaint at 10.

[5] "Along the way I [Beggerly] wrote letters to Presidents Carter, Reagan and Bush, Secretaries of the Interior, Andrus Watts and Lujon [**sic**] and many other federal and state officials and employees. From time to time someone would try to be helpful, but most of the time they told me that since I didn't

after thirteen or more years of research, Beggerly filed a Complaint seeking to have the settlement agreement—as well as Judge Roper's Judgment and Order—set aside. Beggerly contends that newly discovered evidence—a grant predating the Louisiana Purchase and made by the Governor General of Spanish Louisiana to Catalina Boudreau—validates his claim to the Horn Island property.[6]

Beggerly seeks to have the settlement agreement and judgment set aside on the bases of fraud, mutual

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have a patent, there was nothing they could do." Plaintiffs' Exh. 3, at 10-11 (affidavit of Chris Beggerly).

Beggerly's correspondence with government officials has been less-than-cordial:

> Justice in our system is a damn joke. I got this case in Dan Quayle Compentiency [**sic**] Council also. They dropped it? I got the shaft again. Lujon [**sic**] this is in the hands of your people, if they aren't lying too, so you got to them get the facts and if you've got guts enough call me at 601-845-6742.

Letter from Chris Beggerly to Interior Secretary Manual Lujan and copied to "President George Bush, Vice President Dan Quayle, Senator Thad Cochran, Congressman Sonny Montgomery, Senator Trent Lott, John Stossell [of ABC's] 20/20, American Legion [and] Christiania [**sic**] Clark" (dated Sept. 25, 1992), **quoted in** Defendant's Sur-Response at Exh. B.

[6] Prior to filing the Complaint, Beggerly requested that the Bureau of Land Management ("BLM") reconsider the validity of his title to the Horn Island property in light of this newly discovered Spanish land grant. Through a lengthy response, BLM explained "[t]here is no affirmative evidence that the Spanish land grant you provided was ever properly confirmed and without such evidence the 1982 judgment stands and BLM is without power to issue a patent." **See** Plaintiff's Exh. 3(c). Notably, a copy of this "Spanish land grant" has not been made a part of the record or been provided to the United States. **See** United States' Sur-Response at 3-4.

mistake, and inverse condemnation. Beggerly also seeks "not less than $14,500 per acre plus interest and attorney's fees."

Jurisdiction

Beggerly bases jurisdiction, which is disputed to the extent noted in this Memorandum Order, on 28 U.S.C. sec. 1331 "because it arises under the Constitution, laws, and treaties of the United States." **See** Complaint at 1. Beggerly also contends that "this Court has jurisdiction because this action is ancillary to the action filed by the United States in 1979 in **United States v. Adams, et. al.**"[7] **Id.**

Discussion

Rule 60 of the Federal Rules of Civil Procedure provides the means through which an aggrieved party may seek relief from a judgment or order. **See McDonald v. Oliver**, 642 F.2d 169, 171 (5th Cir. 1981). The rule provides, in pertinent part, that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2)

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[7] In his Memorandum Brief in Support of Motion for Summary Judgment, Beggerly relies upon jurisdictional grounds not relied upon in his Complaint. **See, e.g.**, Compare Complaint at 1 (relying on 28 U.S.C. sec. 1331 and ancillary jurisdiction), **with** Plaintiff's Memorandum Brief at 19-20 (relying on 28 U.S.C. sec. 2409(a)). In view of Beggerly's failure to amend his pleadings, this Court need not address the issue or issues raised for the first time in his Motion for Summary Judgment—**i.e.**, whether 28 U.S.C. sec. 2409(a) or other grounds not relied upon in the Complaint provide relief from the 1982 judgment. **See** Fed. R.Civ.P. 8(a) & 15.

> newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party . . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . . . [T]he procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

"Except in extraordinary circumstances . . . , the law favors an end to lawsuits rather than a free reopening and retrial of them."[8] **Lockwood v. Bowles**, 46 F.R.D. 626, 633 (D.D.C. 1969), **quoted in Rozier v. Ford Motor Co.**, 573 F.2d 1332, 1338 n.3 (5th Cir. 1978).

This Court need not address the merits of Beggerly's allegations of fraud,[9] mistake,[10] and newly

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[8] As aptly noted by the Fifth Circuit nearly three decades ago: "Federal Courts have held under a variety of circumstances that a settlement agreement once entered into cannot be repudiated by either party and will be summarily enforced." **Cia Anon Venezolana de Navegacion v. Harris**, 374 F.2d 33, 35 (5th Cir. 1967) (citing cases), **quoted in Howard v. Chris-Craft Corp.**, 562 F.Supp. 932, 936 (E.D. Tex. 1982) (citing cases from other circuit courts).

[9] The party seeking to set aside a settlement agreement or judgment on grounds of fraud "faces a stiff standard of proof." **Howard v. Chris-Craft Corp.**, 562 F.Supp. 932, 937 (E.D. Tex. 1982). The Seventh Circuit articulated this standard:

> One who relies upon fraud, misrepresentation or concealment [to set aside a settlement agreement] must sufficiently allege facts and prove it. The allegations and

discovered evidence[11] because of their untimeliness.[12] On December 3, 1982, Beggerly signed the settlement

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> proof must be **clear and convincing** and must show (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of the falsity or ignorance of the truth, (5) his intent that it should be acted on by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, and (8) his right to rely thereon.

Clarion Corp. v. American Home Products, 494 F.2d 860, 864-65 (7th Cir. 1974), **quoted in Howard**, 562 F.Supp. at 937. In the case **sub judice**, Beggerly has wholly failed to discuss his allegations of fraud in specific terms of these critical elements. **See also** footnote 12, **infra.**

[10] **See generally** 7 J. Moore & J. Lucas, Moore's Federal Practice sec. 60.22 (1991 & Supp.) (discussing case law on this basis of relief under Rule 60(b)(1)).

[11] Under Rule 60(b)(2), "a party can obtain relief from a judgment based on newly discovered evidence only if that evidence is "(1) material and not merely cumulative, (2) could not have been discovered prior to [judgment] through the exercise of reasonable diligence, and (3) would probably have changed the outcome.'" **Dempsey v. Associated Aviation Underwriters**, 147 F.R.D. 88, 90 (E.D. Penn. 1993) (quoting **Bohus v. Beloff**, 950 F.2d 919, 930 (3d Cir. 1991)). Though the arguments of his briefs seem, at times, to be couched in language reflective of Rule 60(b)(2), Beggerly did not cite "newly discovered evidence" as a basis for his Complaint. **See, e.g.**, Plaintiffs' Brief at 3 ("Finally, in 1992, [Beggerly] found a 1781 grant of Horn Island . . . in the National Archives."). This notwithstanding, a careful review of the record leads this Court to the conclusion that Beggerly would be hardpressed to meet the stringent requirements of this Rule—much less succeed in overcoming the timeliness issue.

[12] Though unnecessary, this Court has carefully reviewed the record to determine whether Beggerly has provided any basis in fact or in law to warrant an order setting aside the 1982 settlement agreement and judgment. This review has led to

agreement and Judge Roper issued the judgment and order. Nearly 12 years later—on June 1, 1994—Beggerly filed his Complaint seeking to set aside the agreement and judgment. Thus, Beggerly filed his Complaint nearly 11 years beyond Rule 60(b)'s one-year limitations period and is therefore untimely. Nothing in the record before this Court provides Beggerly with an exception to this conclusion.[13] **See,**

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the conclusion that Beggerly's allegations are devoid of sufficient evidentiary support. **See Teal v. Eagle Fleet, Inc.**, 933 F.2d 341, 347 (5th Cir. 1991) ("district court enjoys considerable discretion when determining whether . . . Rule 60(b) standards" have been satisfied) (citing cases); **see also Wilson v. Johns-Manville Sales Corp.**, 873 F.2d 869, 871 (5th Cir. 1989) (applying abuse-of-discretion standard) (citing **Schauss v. Metals Depository Corp.**, 757 F.2d 649 (5th Cir. 1985)); **Pagan v. American Airlines, Inc.**, 534 F.2d 990, 993 (1st Cir. 1976) ("The principle that a motion to set aside a judgment is addressed to the sound discretion of the trial court and will not be overturned absent an abuse of discretion is firmly established.") (citing cases from other jurisdictions).

The bottom line seems to be—that Beggerly's only basis for having the settlement agreement and judgment set aside is his disputed belief that he can now establish the validity of his title to the Horn Island property. Unfortunately for Beggerly, "[a] settlement [agreement or judgment] will not be set aside . . . merely because one party's case becomes stronger after the settlement is concluded." **Howard v. Chris-Craft Corp.**, 562 F.Supp. 932, 937 (E.D. Tex. 1982). The foregoing aside, the record is—as noted previously—devoid of evidence which would lead this Court to agree with Beggerly's misguided belief.

[13] Although he clearly seems to rely on Rules 60(b)(1)—(3) in his Complaint to set aside the 1982 judgment and settlement agreement, Beggerly "clarifies" in his Motion for Summary Judgment that he is seeking relief through an "independent action in equity." **See** Plaintiff's Memorandum Brief at 4. Assuming this were the case, this Court finds that this basis is

e.g., Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 871 (5th Cir. 1989) (discussing "fraud on the court" exception); **Liljeberg v. Health Servs. Acquisition Corp.**, 108 S.Ct. 2194, 2204 (1988) (discussing Rule 60(b)(6)'s "reasonable time" limitation period).

In addition to the foregoing reasoning, this Court rejects Beggerly's Complaint because "[a] party seeking rescission must attempt to restore the **status quo ante**—that is, to return the parties to the positions they held just before they entered into the agreement." **See Grillet v. Sears, Roebuck & Co.**, 927 F.2d 217, 220-21 (5th Cir. 1991) (citing **United States v. Texarkana Trawlers**, 846 F.2d 297, 304 (5th Cir.), **cert. denied**, 488 U.S. 943 (1988)). Beggerly has made no such attempt and, therefore, is deemed to have ratified the settlement agreement. **Id.** at 221. (citing cases); **see also Fleming v. United States Postal Serv. AFM O'Hare**, 27 F.3d 259, 260-61 (7th Cir. 1994).[14]

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substantively and procedurally deficient. **See, e.g., Humanetics, Inc. v. Kerwit Medical Prods., Inc.**, 709 F.2d 942, 943 (5th Cir. 1983) (discussing "indispensable elements" of this "rare" action); **see also Bankers Mortgage Co. v. United States**, 423 F.2d 73, 79 (5th Cir.), **cert. denied**, 399 U.S. 927 (1970). Indeed, this cause of action—filed 12 years after final judgment was rendered and the settlement agreement signed—is untimely under the doctrine of laches as applied to the facts. **See, e.g., Humanetics, Inc.**, 709 F.2d at 943 ("[T]he doctrine of laches is applicable and undue delay may bar relief."); **In re West Texas Marketing Corp.**, 12 F.2d 702 (5th Cir. 1954) ("There is no time limit on when an independent action may be brought, but the doctrine of laches is applicable and undue delay may bar relief.").

[14] This Court could also reject Beggerly's Complaint on the simple basis that Judge Roper's judgment and order should be

Finally, this Court rejects Beggerly's inverse-condemnation claim that "[t]he entry of judgment on December 3, 1982 . . . constituted a[n unconstitutional] taking of [his] property without the payment of just compensation." **See** Complaint at 17. This Court rejects this claim on jurisdictional grounds. The Tucker Act vests concurrent jurisdiction in the United States Court of Federal Claims and the federal district court over any "claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. sec. 1346(a)(2); **see also Amoco Production Co. v. Hodel**, 815 F.2d 352, 358-59 (5th Cir. 1987). "If the claim exceeds $10,000, the Tucker Act grants exclusive jurisdiction to the Claims Court [now the Court of Federal Claims]." **Amoco Produc-**

"given the finality accorded under the rules of claim preclusion." **See Russell v. SunAmerica Securities, Inc.**, 962 F.2d 1169, 1173 (5th Cir. 1992) ("[T]his Court has long recognized that a consent judgment is a judgment on the merits, and is normally 'given the finality accorded under the rules of claim preclusion.'") (quoting **Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.**, 575 F.2d 530, 538 (5th Cir. 1978)). The four elements of claim preclusion or res judicata are evidenced: (1) The parties are identical in both the 1982 and 1994 actions (**i.e.**, the United States and Beggerly); (2) The prior judgment was rendered by a court of competent jurisdiction (**i.e.**, by Judge Roper on behalf of the U.S. District Court for the Southern District of Mississippi); (3) Judge Roper's decision constituted a final judgment on the merits (**see SunAmerica Securities, Inc.**, 962 F.2d at 1173); and (4) The cause of action is the same (**i.e.**, both 1982 and 1994 causes of action involved the question of ownership over Horn Island property). **See id.** at 1172.

tion Co., 815 F.2d at 358 (citing 28 U.S.C. sec. 1491(a)(1)); **see also Graham v. Henegar**, 640 F.2d 732, 734-35 & n.6 (5th Cir. 1981) (citing cases from other courts of appeal). Application of this law to the facts clearly leads to the conclusion that the Court of Federal Claims has exclusive jurisdiction over Beggerly's inverse-condemnation claim.[15]

In sum, Beggerly's complaint, for the most part, is untimely. In the alternative, this Court's careful review of the record has yielded little or no evidence to support Beggerly's allegations of fraud, mutual mistake, and so forth. The United States acted in good faith in the settlement of this case. **See Cia Anon Venezolana de Navegacion v. Harris**, 374 F.2d 33, 35 (5th Cir. 1967) ("Where the parties, acting in good faith, settle a controversy, the courts will enforce the compromise without regard to what the result might, or would have been, had the parties chosen to litigate rather than settle.") (quoting **Hennessy v. Bacon**, 137 U.S. 38). Indeed, the United States sat "in the driver's seat" and could have refused to pay for what it already owned.[16] Instead, the United States decided

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[15] The time for filing suit in the Court of Federal Claims has presumably expired. "Every claim of which the . . . Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. sec. 2501; **see also Steel Improvement & Forge Co. v. United States**, 355 F.2d 627, 631 (Ct. Cl. 1966) ("It is axiomatic that a cause of action for an unconstitutional taking accrues at the time the taking occurs.") (citing cases).

[16] On two separate occasions, Beggerly employed an attorney to evaluate the validity of his title to the Horn Island property. In 1976, Beggerly's attorney, Lawrence Corban, advised him that no patents for Horn Island had ever been issued by the United States and that he had "no valid claim to owner-

to provide Beggerly with a "six-figure" windfall, which Beggerly accepted[17] and which will remain undisturbed.

IT IS THEREFORE ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss is hereby **GRANTED** and the Plaintiffs' Motion for Summary Judgment be **DENIED**.

SO ORDERED AND ADJUDGED this the *16th* day of *Aug.*, 1995.

/s/ DAN M. RUSSELL, Jr.
DAN M. RUSSELL., Jr.
UNITED STATES
DISTRICT JUDGE

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ship of the property." **See** Defendant's Sur-Response at Exh. "A" (affidavit of Thomas Piehl). In 1982, during settlement negotiations with the United States, attorney James Martin advised Beggerly that he could not "win" his case "because [he] could not prove that [he] had good patents." **See** Plaintiffs' Exh. 3, at 10 (affidavit of Chris Beggerly).

[17] **See** Plaintiffs' Exh. 3, at 10 (where Beggerly concedes through sworn affidavit that he "agreed" with his attorney's advice that he "had no choice" but to accept the United States' settlement proposal).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. 1:94CV264RR

CHRIS BEGGERLY, ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: Aug. 25, 1995]

ORDER OF DISMISSAL

This Court, having considered the Motion to Dismiss of the United States of America (Government), filed herein on January 17, 1995, and the Motion for Summary Judgment of the plaintiffs filed herein on March 17, 1995, and having entered its Memorandum Order pertaining to those motions on August 16, 1995, which Memorandum Order is incorporated herein by reference, does, for the reasons stated in that Memorandum Order, further, find that the relief sought by the Government's motions to dismiss should be granted and the relief sought by the plaintiffs' Motion for Summary Judgment should be denied. Further, there are some non-dispositive motions filed herein, including a Motion to Amend (filed on July 12, 1995) and a Motion to Strike Sur-Response or in the Alternative to File a Response (filed on August 14, 1995),

both filed by the plaintiffs, that have not been ruled upon by this Court. However, because of the findings and rulings herein and in the Memorandum Order, the relief sought by all pending non-dispositive motions has been rendered moot and should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED as follows:

1. The relief sought by the United States of America in its aforesaid Motions to Dismiss is hereby granted; and, accordingly, the complaint and all counts therein are hereby dismissed, with prejudice;

2. The relief sought by the plaintiffs in their aforesaid Motion for Summary Judgment is hereby denied; and

3. The relief sought by the plaintiffs and/or the defendant by all pending, non-dispositive motions, including the aforesaid Motion to Amend and the aforesaid Motion to Strike Sur-Response or in the Alternative to File a Response, both filed by the plaintiffs, is hereby denied.

SO ORDERED AND ADJUDGED, this 22nd day of Aug. ,1995.

/s/ DAN M. RUSSELL, Jr.
DAN M. RUSSELL., Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. 1:94-CV-264RR

CHRIS BEGGERLY, ET AL., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Sept. 21, 1995]

MEMORANDUM ORDER

This matter is before the Court on Plaintiff's Motion for Rehearing.

Background and Jurisdiction

For the sake of brevity, reference is made to this Court's Memorandum Order signed on August 16, 1995, for the background of this case and the grounds for jurisdiction.

Discussion of Motion

For the most part, the Plaintiffs (hereinafter "Beggerly") assert that their Motion for Rehearing should be granted because:

> The Court's Memorandum Order was issued by Judge Dan M. Russell, Jr., though the parties had consented to an order referring the case to a United States Magistrate Judge on March 16,

> 1995 . . . and an order of reference, signed by Judge Dan M. Russell, Jr., was entered on March 17, 1995. . . . The order of reference expressly provides "that the above-captioned matter be referred to United States John M. Roper for the conduct of *all* further proceedings and entry of judgment." . . . Accordingly, all filings after that date were submitted to Magistrate Judge Roper including the Plaintiffs' response to the pending motion and briefs. However, notwithstanding the entry of the referral order, and without any notice, explanation or subsequent order of transfer, Judge Russell decided the pending motions and entered the Memorandum Order on August 16, 1995, five months after "all further proceedings" were transferred to Magistrate Judge Roper.

See Motion for Rehearing at 1-2.

The Defendant, the United States, responds that Beggerly's Motion is "frivolous" and another "example of the flagrant disregard plaintiffs have exhibited for the Court's Order of December 3, 1982." **See** Response at 1.

This Court does not dispute that both parties signed a "Consent to Jurisdiction by a United States Magistrate Judge" on March 16, 1995. **See** Plaintiff's Exh. A. Moreover, this Court does not dispute that it signed an "Order of Reference" on March 17, 1995. **See** Plaintiffs' Exh. B. However, a long-standing "policy" or "rule" of the Southern District of Mississippi—of which Beggerly should have been well aware—has dictated that all dispositive motions (**e.g.**, Motions to Dismiss and for Summary Judgment) shall be handled by the district judge and not by the magistrate judge "even though consents are obtained."

Chief Judge William H. Barbour, Jr. explained the basis of this local rule in a March 1994 memorandum directed to "all District Judges and Magistrate Judges" of the Southern District: The Magistrate Judges have little "time available to do any trial work" in view of the "substantial additional load [they] now have on them because of having to conduct the case management conferences and because they do not have sufficient staff to handle dispositive motion work in the consent cases." Thus, "[t]o impose upon them the dispositive motion work . . . would be unfair."

In accordance with the foregoing rule, this Court handled the Plaintiffs' Motion for Summary Judgment and the Defendant's Motion to Dismiss—denying the former and granting the latter. This decision brought the case to a close—thereby making a subsequent reference to the magistrate judge for trial unnecessary. Beggerly's surprising lack of "notice" of this Court's handling of the dispositive motions is of no consequence to the outcome of this case. This Court would have handled the dispositive motions whether Beggerly had notice—or not.

This Court also rejects Beggerly's other bases asserted in his Motion for Rehearing. One basis—this Court's alleged failure to address Beggerly's Motion to Amend—is frivolous. This Court denied the Motion in its Order of Dismissal.[1] The other basis—this

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[1] In reconsidering this issue, this Court again denies the Motion to Amend on procedural grounds. Procedurally, Beggerly filed the Motion in an untimely manner. Beggerly filed the Motion on July 13, 1995—nearly six months after the United States filed its Motion to Dismiss (January 19, 1995) and four months after Beggerly filed its own Motion for Summary Judgment (March 20, 1995). By the time Beggerly had filed

Court's alleged failure to address Beggerly's Motion to Strike Defendant's Sur-Response—is also frivolous. Again, this Court denied the Motion in its Order of Dismissal.[2]

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiffs' Motion for Rehearing is hereby **DENIED.**

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the Motion to Amend, this Court had decided the Motions to Dismiss and for Summary Judgment—although the decision had not yet been published. In short, Beggerly had "put the cart before the horse" by asserting the jurisdictional ground in its Motion for Summary Judgment before seeking this Court's permission to amend its Complaint. Beggerly's belated attempt to remedy the cart-horse scenario could not forestall this Court's decision on the issue which had already been made.

The foregoing notwithstanding and assuming **arguendo** that the Motion to Amend were granted, this Court would nonetheless reject Beggerly's jurisdictional argument on substantive grounds. Through his Motion to Amend, Beggerly sought to add the Quiet Title Act (28 U.S.C. sec. 2409(a)) as a new ground for jurisdiction. **See** Brief in Support of Plaintiffs' Motion to Amend. at 1. Inclusion of this Act, however, would have had no impact on the outcome of this case under the facts and law. In short, this Court concurs in the United States' assessment of Beggerly's argument concerning the Quiet Title Act. **See** United States' Memorandum Brief in Response to Plaintiffs' Motion for Summary Judgment at 20-22.

[2] The substance of the United States' Sur-Response had absolutely no bearing on this Court's decision to grant the Motion to Dismiss. Indeed, the Court had already reached a decision by the time the United States had filed its Sur-Response.

SO ORDERED AND ADJUDGED, this the 20th day of Sept.,1995.

/s/ DAN M. RUSSELL, Jr.
DAN M. RUSSELL., Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60625

CHRIS W. BEGGERLY; JAMES R. BEGGERLY; CLARK M. BEGGERLY; VELMA B. GARNER; SUZANNE REED; DAVID REED, PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

[Filed: July 28, 1997]

On Petition for Rehearing and Suggestion for Rehearing En Banc

Before: POLITZ, Chief Judge, EMILIO M. GARZA and STEWART, Circuit Judges.

PER CURIAM:

Other than as reflected in the substituted opinion, the petition for rehearing is DENIED. No member of this panel nor judge in regular service on the court having requested that the court be polled on

rehearing en banc,* the suggestion for rehearing en banc is also **DENIED.**

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
HENRY A. POLITZ, Chief Judge

Emilio M. Garza, Circuit Judge, dissenting.

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* FRAP and Local Rule 35.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. S79-0338(R)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDREW J. ADAMS, JR., ET AL., DEFENDANTS

[Filed: Dec. 3, 1982]

JUDGMENT AND ORDER

This matter having come before the Court for a hearing and the Court having considered the evidence presented and the terms of a Stipulation for Settlement dated December 3, 1982, and the Court having determined that judgment should be entered quieting title in favor of the United States with regard to all lands and interests in lands on Horn and Petit Bois Islands which defendants have or may have claimed and which are more particularly described in the Complaint, Exhibit A attached hereto;

IT IS ORDERED that judgment is hereby entered in favor of the United States, and title to all lands on Horn and Petit Bois Islands, which lands are described in the Complaint, Exhibit A attached hereto, is quieted in the United States of America; and

FURTHER ORDERED that all defendants and their heirs are permanently enjoined from asserting any adverse claims to the subject property described in the Complaint, Appendix A attached hereto; and it is

FURTHER ORDERED that the United States has title in fee simple absolute to and full rights of possession of the subject property.

IT IS FURTHER ORDERED that no attorneys' fees against the United States be allowed and that each party bear their own costs.

ORDERED AND ADJUDGED this *3rd* day of December, 1982.

/s/ JOHN M. ROPER
JOHN M. ROPER
UNITED STATES
MAGISTRATE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. S79-0338(R)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDREW J. ADAMS, JR., ET AL., DEFENDANTS

[Filed: Dec. 7, 1982]

STIPULATION AND SETTLEMENT

Comes now the United States of America through its undersigned attorneys and defendants, Arthur Baker, Ralph Baker, Walter N. Wentzel, L. M. Page and Francis Stanovich, by and through their undersigned attorney, Lyle M. Page; David A. Doherty, Adalaide H. Doherty, Mrs. A. E. Hurd, Sr., Mrs. Anne H. Bradley, Mrs. Jane H. Sims, Mrs. Irene H. Hawley, Alfred E. Hurd, Jr., Louis W. Hurd, Mrs. Linda H. Smith and Mrs. Faye H. McCarey, by and through their undersigned attorney, Wynn E. Clark; W. B. Jones, Pro Se; First National Bank of Jackson, Trustee of Paul Chambers Mineral Trust, J. S. Love, Jr., M. B. Puckett, Petit Bois, Inc., J. R. Beggerly, Chris W. Beggerly, Velma B. Garner, Norma Reed and Clark M. Beggerly, Jr., by and through their undersigned attorney, James L. Martin; State of

Mississippi, by and through its undersigned attorney, Mack Cameron; E. J. Delcambre, Ronnie Strahan and Ellison Hebert, by and through their undersigned attorney, C. W. Ford; Fred Lemon, by and through his undersigned attorney, Russell Thompson; Lou Ann Gilly, Frances Wade Gilly and Ola Pitalo, by and through their undersigned attorney, Jacob D. Guice; Jimmy L. McClellan and Aimee McClellan, Heirs of Carroll E. Williams and Allen D. and Betty Rooke, by and through their undersigned attorney, George Morse; Marlene Gillich and Frank Schenck, by and through their undersigned attorney, Keith Pisarich; Raymond Bass, Bartlo Hunt, Anthony J. Bertucci, Grace Bertucci and Noel J. Skrmetti, by and through their undersigned attorney, Robert A. Acevedo; Mrs. E. Regan Berry, Beverly C. and Johnny Romeo, Grover Graham, Jr., Thomas J. Wiltz, Margaret M. Brou, Miss Jonnie Parkinson, C. H. Eisendrath, Dr. Clay Easterly, Donald F. Santa Cruz, Jr., et ux, Jerry Covich, Jr., and Shannon R. Covich, Victor B. Pringle, Laz Quave, Helen George Leonard, A. W. Covacevich, Wakeman B. Curtis, Ganavieve Curtis, Naif Jordan, Caroline Bell Leader and Michael L. and Suzanne Fondren, by and through their attorney of record, Thomas J. Wiltz; and Dan Breland, by and through his undersigned attorney, R. L. Netterville; and hereby stipulate and agree as follows:

WHEREAS, this quiet title action was instituted by the filing of a complaint on September 7, 1979, reference to which is made for all purposes; and

WHEREAS the above-named defendants acting by and through their attorneys have stipulated and agreed that they and each of them will submit to the entry of an order in the form as shown by Exhibit A

attached hereto in favor of the United States of America with regard to any and all interests in lands on Horn and Petit Bois Islands which are more fully described in Exhibit B which defendants have or may have claimed and which are the subject of this lawsuit in consideration for the sum of Four Hundred Thousand and no/100 Dollars ($400,000.00) to be deposited in the registry of the Court; and it is further stipulated and agreed that the sum shall be full and just compensation and in full satisfaction of any and all claims of whatsoever nature including attorneys' fees against the United States of America by reason of the settlement of the action; and

The said parties hereby consent to the entry of any and all orders and judgments necessary to effectuate this stipulation and agreement.

GEORGE PHILLIPS
United States Attorney

By

/s/ JERRY A. DAVIS
JERRY A. DAVIS
Assistant United States Attorney

/s/ STEVEN A. HERMAN
STEVEN A. HERMAN
Attorney, Department of Justice

/s/ RALPH GLENN ESKITE
RALPH GLENN ESKITE
Attorney, Department of Justice

/s/ DAVID F. SHUEY
DAVID F. SHUEY
Attorney, Department of Justice

/s/ LYLE M. PAGE
LYLE M. PAGE

/s/ WYNN E. CLARK
WYNN E. CLARK

/s/ BILL JONES
W. B. JONES, Pro Se

/s/ JAMES L. MARTIN
JAMES L. MARTIN

/s/ MACK CAMERON
MACK CAMERON

/s/ C.W. FORD
C. W. FORD

/s/ RUSSELL THOMPSON
RUSSELL THOMPSON

/s/ JACOB D. GUICE
JACOB D. GUICE

/s/ GEORGE MORSE
GEORGE MORSE

/s/ KEITH PISARICH
KEITH PISARICH

/s/ ROBERT A. ACEVEDO
ROBERT A. ACEVEDO

/s/ THOMAS J. WILTZ
THOMAS J. WILTZ

/s/ R. L. NETTERVILLE by ?
R. L. NETTERVILLE

Dated: December 3, 1982

APPENDIX I

1. Rule 60(b) of the Federal Rules of Civil Procedure provides:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of co-

ram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

2. Section 2409a of Title 28, United States Code, provides in pertinent part:

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. * * *

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or any part of it as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

* * * * *

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced with twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or

his predecessor in interest knew or should have known of the claim of the United States.

Supreme Court, U.S.
FILED
NOV 26 1997
CLERK

(2)

No. 97-731

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRIS W. BEGGERLY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ERNEST G. TAYLOR, JR.
Counsel of Record
ROBERT M. ARENTSON, JR.
WATKINS LUDLAM & STENNIS, P.A.
633 North State Street
Jackson, Mississippi 39202
(601) 949-4900

Counsel for Respondents

Nov. 26, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PARTIES TO THE PROCEEDING

In the Government's statement of parties to the proceeding, it omitted James R. Beggerly. The following statement is the same as the Government's with this one addition.

Petitioner is the United States of America. Petitioner was defendant in the district court and appellee in the court of appeals. The respondents, Chris W. Beggerly, James R. Beggerly, Clark M. Beggerly, Velma B. Garner, Suzanne Reed, and David Reed, were plaintiffs in the district court and appellants in the court of appeals.

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STATEMENT OF THE CASE

In 1950, Clark M. Beggerly, Sr. purchased 729 acres of land on Horn Island at a Jackson County, Mississippi tax sale. He purchased this property as a long-term investment for the benefit of his family. (S.J. I,tab 3,pp.1-2; A. I:50-51).[1] After the purchase, the Beggerly family continually paid ad valorem taxes on the property and their ownership was generally known and recognized by the local residents, the county, state and federal government. (S.J. I,tab 3,pp.7-8; A. I:57-58,75).

In 1971, the United States Congress adopted legislation creating the Gulf Islands National Seashore Park. 16 U.S.C. § 459h. The purpose of the park was to protect barrier islands in the Gulf, including Horn, Ship and Petit Bois, from development and to preserve them in their natural state. 16 U.S.C. § 459h.

Within a few months after the act creating the park was adopted, John S. Creighton, a land acquisition officer for the Department of Interior offered the Beggerlys approximately $200.00 per acre for their land which they rejected. (S.J. I,tab 4,p.4; A. I:76-77) Over the next three years, the federal government agents continued to contact

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[1] The record references used in this brief are the same as those used in the briefs filed in the Fifth Circuit Court of Appeals. Record references state the volume as a Roman numeral followed by a colon and then the page number. When reference is made to Record Excerpts in the Appendix, the reference is A. followed by Volume:page number. The documents supporting the Plaintiffs' motion for summary judgment are bound together in two bound sets of documents which are referred to as S.J. I and S.J. II.

the Beggerlys in an effort to buy their land. In 1975, when the Beggerlys were under intense pressure at work and could not muster the time or money to fight the Government, James R. Beggerly ("Raleigh") relented and agreed to accept $200.00 per acre.[2] The parties signed a contract and Raleigh Beggerly waited to receive his check. After waiting several months and making a number of telephone calls, the Beggerlys found out the Government was not going to honor its contract. (S.J. I,tab 3,p.7; A. I:7; S.J. I,tab 4,pp.5-6, A. I:78-79).

For the next four years, the Beggerlys heard nothing from the Government. Then, in September 1979, the Government filed *United States v. Adams*, Civil Action No. S79-0338(R), United States District Court for the Southern District of Mississippi, Southern Division, to quiet title to the Beggerly property and certain other properties on Horn, Ship and Petit Bois Islands. The Government claimed that it had acquired title to Horn, Ship and Petit Bois Islands through the Louisiana Purchase in 1803, and that it had never issued patents on or otherwise conveyed its interest in the properties listed in the complaint. The complaint identified the Beggerlys' property and alleged that their title was not supported by a valid patent. (R. II:Ex. I; A. I:191).

During the pendency of the suit, the Beggerlys, their lawyers and experts made a diligent effort to find a valid patent or grant to support their title. (S.J. I,tab 4,pp.6-7;

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[2] There were two parcels involved, a 620 acre tract owned by Raleigh Beggerly and a 120 acre tract owned by Raleigh and the other family members. The contract to sell applied to the 620 acre parcel only. (R. I:215-216; A. I:11-12).

A. I:79-80; S.J. II,tab 7,pp.2-3; A. I:86-87). Throughout the litigation, the Government represented to the Beggerlys and the court that there was no grant or patent validating the Beggerlys' title. (R. II:Ex. E,p.1). Unable to find a grant or patent, and facing an imminent trial date, the Beggerlys accepted a nominal settlement of approximately $200.00 per acre to cover their litigation costs, time and trouble, but not market value for acquisition of their title. (S.J. I,tab 3,p.10; A. I:60,66). Both the Government and the Beggerlys knew that the market value of the property far exceeded $200.00 per acre. (S.J. II,tab 4,p.4; A. I:88).

Shortly after the Government filed the *Adams* suit to quiet title to "unpatented" properties on Horn, Petit Bois and Ship Islands, a developer began site work on 717 acres on Petit Bois Island, one mile east of the Beggerly property on Horn Island. (S.J. II,tab 7,pp.10-11; A. I:107-08). The Government recognized that the owners of this Petit Bois property had a valid title, but, consistent with the purpose of the park, wanted to prevent development. Therefore, it filed a condemnation suit and took title to the property before any significant development occurred. (R. II:Ex. J; A. I:91). In the Petit Bois condemnation litigation, *United States v. 717.42 Acres*,[3] the district

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[3] *United States v. 717.42 Acres of Land, More or Less Situate in the County of Jackson, State of Mississippi and Petit Bois, Inc., et al.*, Cause No. S80-0450(N), United States District Court for the Southern District of Mississippi; Southern Division. (S.J. II, tab 7, Ex. A; A. I:98).

court rejected the Government's appraisal, which indicated a value of $200.00 per acre, finding that it represented the Government's internal value for park purposes and not fair market value. After valuation hearings, the court awarded $8,500.00 per acre for the surface and $6,000.00 per acre for minerals. (R. II:Ex. K&L; S.J. II,tab 7, Ex. B; A. I:98,117-118,120).

Even though they had lost their title when the judgment was entered in the *Adams* case and had received only a fraction of its value in the settlement ($200 per acre – compared to the Petit Bois just compensation award of $14,500 per acre), the Beggerlys continued their search for a grant or patent. They contacted state, local and federal officials and filed Freedom of Information Act requests. (S.J. I,tab 3,p.10; A. I:60). Ultimately, they became convinced that the most likely source of a grant would be from the Spanish government during the latter part of the Eighteenth Century, when Spain had sovereignty over the area. The Beggerlys employed Edith Axelson, a genealogist in Washington, D.C., to do research in the National Archives. After meticulous review of over seventy-five files, Mrs. Axelson found the Boūdreau Grant in the Civil Records Branch of the National Archives in Washington, D.C. (S.J. I,tab 3,p.11; A. I:61; S.J. I,tab 5,p.2; A. I:126).

The Boudreau Grant is the Government's official record of a Spanish grant made by Bernardo de Galvez, Governor General of Spanish Louisiana, a Knight and Colonel of the Royal Army, to Catarina Boudreau in 1781. Ms. Boudreau, a prominent widow from Pascagoula, met Galvez in Mobile in 1780 after he had won the battle of Mobile and taken it for the Spanish Crown. (S.J. I,tab 6,pp.24-26; A. I:175-177). She later petitioned Governor

Galvez to grant her Horn Island as he had promised to do. He made good on his promise. (S.J. I,tab 6,pp.21-22; A. I:172-173). In 1816, heirs of Ms. Boudreau presented the grant to U.S. Commissioners who recorded it and it has remained continuously in the institutional control and custody of the Government since that time. (S.J. I,tab 6,p.4; A. I:136).

The Beggerlys promptly sent the Grant to the Bureau of Land Management ("BLM") in Washington, D.C. and requested that their title be recognized and patents issued. The Department of Interior personnel, apparently relying upon *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), advised the Beggerlys that they were aware of the Grant but since it had not been confirmed by Congress, it was not valid. (S.J. I,tab 3,Ex. "C"; A. I:67,72-73). BLM assured the Beggerlys that it had thoroughly researched all issues and if they did not agree with this opinion, they could file suit. (S.J. I,tab 3,Ex. C; A. I:73).

The Beggerlys pressed on. They contacted experts at the Mississippi Archives and at archives in New Orleans to find an expert who could evaluate the Boudreau Grant. (S.J. I,tab 4,pp.9-10; A. I:82-83). Their investigation led them to Dr. Hans Baade, a professor of International Law at the University of Texas Law School, and a preeminent scholar on Spanish land grants. They employed Dr. Baade and, after careful study, he wrote an exhaustive thirty page opinion stating that the Grant was a valid, binding and final grant of Horn Island under the Spanish law when made and that its validity was subsequently confirmed by the Treaty of Amity and Settlement between the United States and Spain as interpreted by Chief Justice John Marshall in *United States v. Percheman*, 32 U.S. (7

Pet.) 51 (1833). (S.J. I,tab 6,pp.2-3; A. I:135-136). Therefore, when the Government gained sovereignty over Horn Island in 1803, it did not get title to Horn Island which was granted by the prior sovereign to a private owner in 1781. Title continued in the name of the private owners – the Boudreaus and their successors in interest – the Beggerlys. (S.J. I,tab 6,p.3; A. I:135).

Having no other recourse, the Beggerlys filed their suit on June 1, 1994. (R. I:1; A. I:29). Since the Fifth Circuit Opinion, *Beggerly v. United States*, 114 F.3d 484 (5th Cir. 1997), provides an adequate statement of the course of proceedings in the litigation, we will not restate those developments here; however, it is noteworthy that all of the issues now before the Court were presented to the Fifth Circuit and the litigation ended when not a single member of the Fifth Circuit requested that the court be polled in response to the Government's Petition for Rehearing en banc. (Government's Appendix, 52a) This petition is simply a desperate, last-ditch effort by the Government.

SUMMARY OF THE ARGUMENT

The court below found that the Beggerly family had proved title to 729 acres of land that the federal government had erroneously claimed. While this case presents extraordinary facts, in the end this is simply a title suit, which, like most title suits, turns on the facts uniquely associated with the real estate at issue. The Government makes a game effort to convince the Court that this case presents legal and fact issues of great importance to the

public interest, but in fact that simply is not the case. The Boudreau Grant relates to Horn Island only. It has no bearing on any other islands in the Gulf of Mexico. The *Adams* quiet title suit, through which the Government got title to the Beggerly property, affected only a portion of Horn Island. In fact, it appears that the Beggerlys' 729 acres are approximately one-half of the total acreage in the *Adams* litigation.[4] Therefore, the other claims which could result from the Fifth Circuit ruling are very limited in scope and well defined. There is no factual basis for the Government's representation that the Fifth Circuit ruling may unsettle titles on barrier islands throughout the Gulf of Mexico.

The most important point is that the Fifth Circuit ruling is correct. The Government argues that the Fifth Circuit's ruling that the Boudreau Grant was a valid grant is in conflict with *United States v. Power's Heirs*, 52 U.S. (11 How.) 570 (1851), which the Government did not cite below. A careful review of the *Power's Heirs* opinion reveals that this Court did not have a complete record before it at the time and erroneously assumed that the King of Spain had not vested Governor Galvez with authority to make grants along the Mississippi Gulf Coast until 1783. Historical documents which are now universally accepted as stating the correct facts establish beyond question that Governor Galvez did have authority to

[4] The Beggerlys received a $208,000 settlement in the *Adams* litigation, 114 F.3d at 489; the total settlement for all parcels was $400,000, Government's Appendix at 58a, indicating that the Beggerly acreage was slightly more than half of the total acreage in litigation.

make the Boudreau Grant in 1781; therefore, the Fifth Circuit ruling, which is based on a complete historical record not available to this Court in 1851, is correct.

Each of the Government's arguments is addressed below in the order which the Government presented them.

ARGUMENT

I. The District Court Did Have Ancillary Jurisdiction to Set Aside the Consent Judgment.

In 1979, the Government filed suit in the federal district court in Biloxi, Mississippi, against the Beggerlys to quiet title to the Beggerlys' property. Because of the Government's failure to produce the Boudreau Grant and its repeated representations that no such grant existed, judgment was entered in favor of the Government. Once the Beggerlys found the Boudreau Grant and were able to defend their title, they filed suit in the same district court that entered the judgment against them seeking to have that court set aside its judgment. The general rule of supplemental, or ancillary, jurisdiction is that when the Government sues, the defendant may assert such claims as necessary to fully defend himself. The court's jurisdiction to hear defensive claims arising out of the same controversy is well established. *See* 7 James W. Moore, *Moore's Federal Practice*, ¶ 60.38, at 60-397 to 99 (2d ed. 1995). Without this basis for jurisdiction, a federal court could not do complete justice. 13 Charles A. Wright, et al., *Federal Practice & Procedure* § 3523 (2d ed. 1984).

The Fifth Circuit, citing *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 312 F.2d 702 (5th Cir. 1954) and *Weldon v. United States*, 70 F.3d 1 (2d Cir. 1995) as authority, properly ruled that:

> We have held that an independent action filed in the same court that rendered the original judgment is a continuation of the original action for purposes of subject matter jurisdiction.
>
> . . . .
>
> To allow the government to use sovereign immunity as a shield where it previously has invoked the court's jurisdiction and prevailed based upon its misrepresentations, negligence, or mistake would do unacceptable violence to our basic notions of justice.

114 F.3d at 487.

In addition to the ancillary jurisdiction, the court clearly had jurisdiction under the Quiet Title Act, 28 U.S.C. § 2409a(b), to consider the issues before the court and to ultimately adjudicate title.

II. The Court Correctly Ruled That the Quiet Title Act's Limitation Period is Subject to Equitable Tolling.

During the *Adams* litigation, the Beggerlys, their lawyers and experts made a diligent effort to find a valid patent or grant to support their title. Throughout the litigation, the Government failed to produce that document and affirmatively represented to the court and the

Beggerlys that the document did not exist. The Government, however, possessed the essential evidence necessary for the Beggerlys to prove their title the entire time. After the *Adams* settlement, it took the Beggerlys ten years of continuous searching in archives all over the country before they finally found the document in the Government's possession. The Government now argues that that is too bad, the statute of limitations has run. This is a classic case for equitable tolling.

The Government challenges the district court's finding that the limitations period of the Quiet Title Act was equitably tolled. The Government states that "[t]he question whether the QTA's limitation period is subject to equitable tolling is one of considerable importance to the management of federal lands." The Government, however, provides no justification or explanation for this statement. We fail to see how the Fifth Circuit's application of equitable tolling in this case could have impact on other federal lands unless the Government has followed a general practice of misrepresenting the existence of patents and grants in its acquisition of lands from other private land owners.

The Fifth Circuit's ruling on equitable tolling is correct. As a general rule, the doctrine of equitable tolling is read into most federal statutes of limitations. *Cada v. Baxter HealthCare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991). Equitable tolling is applicable to suits against private defendants as well as suits against the United States. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92 (1990); *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991). In addition, the propriety of equitable tolling must be determined on a

case-by-case basis. *Million v. Frank*, 47 F.3d 385, 389 (10th Cir. 1995). The statute of limitation in the Quiet Title Act, 28 U.S.C. § 2409a(g), is subject to equitable tolling. *Fadem v. United States*, 52 F.3d 202, 206 (9th Cir. 1995), *vacated*, 117 S. Ct. 1103 (1997), *reinstated*, 113 F.3d 167 (9th Cir. 1997).

In *Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995), the Court of Appeals held that the statute of limitations in the Quiet Title Act was subject to equitable tolling. The Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of its holding in *United States v. Brockamp*, 117 S. Ct. 849 (1997). On remand the Court of Appeals concluded that *Brockamp* did not affect the court's analysis and reinstated its decision. The court stated:

> None of the considerations which led the Court to reject the rebuttable presumption of equitable tolling in *Brockamp* apply to this case. 28 U.S.C. § 2409a(g) is non-technical, non-substantive and comprised of two short sentences:
>
> > Any civil action under this section . . . shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.
>
> Equitable tolling in a quiet title action is a doctrine to be applied by the court to the relatively few quiet title action suits in which it is raised, not by an administrative agency in potentially thousands of cases. Equitable tolling in this case

> is well within the Court's direct *Irwin* precedent.[5]

Fadem, 113 F.3d at 167-68.

The Government asserts that the district court's "holding that the QTA's limitation period is subject to equitable tolling, if left unreviewed, could have serious consequences for the stability of title in federal lands." The Government is attempting to give the impression that this decision will have a national impact, when in reality, the impact will be limited to a portion of Horn Island.

III. The Fifth Circuit Did Have Authority to Reverse the Dismissal of the Summary Judgment and to Direct Entry of Summary Judgment.

The Government filed a motion to dismiss supported by documents, other than the pleadings, which in effect was a summary judgment motion. The Beggerlys filed a summary judgment motion with supporting documents. Therefore, this case came before the Fifth Circuit on cross-summary judgment motions. There were no material facts at issue. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Courts of appeal review a district court's determination on a motion for summary judgment *de novo*. *FTC v. Hospital Bd.*

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[5] *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990).

of Directors, 38 F.3d 1184, 1187 (11th Cir. 1994); *Esmark Apparel, Inc. v. James*, 10 F.3d 1156, 1159 (5th Cir. 1994).

In *Sacred Heart Medical Ctr. v. Sullivan*, 958 F.2d 537 (3d Cir. 1992), the third circuit was faced with an appeal regarding both a denial of summary judgment and an order granting a cross-motion for summary judgment. *Sacred Heart*, 958 F.2d at 543. The court held:

> [w]hen an appeal from a denial of a summary judgment is raised in tandem with an appeal of an order granting a cross-motion for summary judgment, we have jurisdiction to review the propriety of the denial of summary judgment by the district court. In addition, where, as here, the facts are uncontroverted, we are free to enter an order directing summary judgment in favor of the appellant.

Id. (citations omitted); *see McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 253 (10th Cir. 1993). The Third Circuit's position is consistent with authority that states "the reviewing court may direct the entry of summary judgment even though the district court did not act favorably on the motion. The appellate court can either include the order as part of its opinion or remand the case with directions to enter summary judgment." 10 Charles A. Wright, et al., *Federal Practice & Procedure* § 2716 (2d ed. 1983); *see, e.g., Morgan Guar. Trust Co. v. Martin*, 466 F.2d 593, 599-600 (7th Cir. 1972).

The Government recognizes that when the facts are not at issue, it is appropriate to enter summary judgment. See Government's Petition for a Writ of Certiorari at page 27 citing *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 543-544, & n.24 (7th Cir. 1996). It then

states this is manifestly not such a case, though it fails to identify the facts that are at issue. The record clearly establishes that the original quiet title action was lost because the Beggerlys did not have the Boudreau Grant. They produced the Boudreau Grant in support of the subsequent action and they won. The only difference between the original action and the second action was the Boudreau Grant. The only question is whether or not the Boudreau Grant is valid, which is a legal issue.

In addition, the court necessarily had to review the merits of the case in order to determine whether or not this was a proper case for an independent action in equity. At 114 F.3d 487, the Fifth Circuit lists the five elements necessary to prove an independent action and it states that the Beggerlys satisfied all of these elements. The second element is "a good defense to the alleged cause of action on which the judgment is founded." In order to determine whether or not a good defense was available, the court necessarily had to consider the validity of the Boudreau Grant, which it did. After it had considered it, the controlling legal issue was determined and the summary judgment was inevitable.

IV. The Boudreau Grant is Valid and Binding.

Though the Government failed to challenge the authority of Bernardo de Galvez to issue the Boudreau Grant at any time in the courts below, it now, for the first time, argues that Galvez did not have that authority and cites in support of its argument *United States v. Power's Heirs*, 52 U.S. (11 How.) 570 (1851). The Beggerlys' expert witness, Dr. Hans Baade, addressed Galvez' authority to

make this grant in his report at page 7 (citing D. C. Corbitt, "The Administrative System in the Floridas") (A. I:158). It is apparent from reading the *Power's Heirs* decision that this court had an incomplete record before it and erroneously assumed that the King of Spain had not granted Galvez authority to issue grants in Mississippi in 1781. If, in 1851, this court had had the complete historical record now available, the court would have known that Galvez did have the requisite authority to make grants in 1781. There is absolutely no doubt Galvez had authority to make the Boudreau Grant in 1781.

The Government argues that the court of appeals erred in concluding, in reliance on an expert opinion, "that Bernardo de Galvez had authority in August 1781 to grant Horn Island to Catalina Boudreau . . . " "[T]hat conclusion," the Government contends, "is in direct conflict with this Court's determination in *Power's Heirs*, 52 U.S. (11 How.)[570] at 579-580 [1851] that de Galvez lacked legal authority to issue grants to lands east of the Pearl River on August 1, 1781, the very day he is said to have issued the grant to Catalina Boudreau for Horn Island, which is east of the Pearl River."

With respect, that submission is misleading. As this Court stated, *id.* at 577-78:

> By the laws of nations, in all cases of conquest, among civilized countries, having established laws of property, the rule is, that laws, usages, and municipal regulations in force at the time of the conquest remain in force until changed by the new sovereign. And this raises the question of fact, whether the king of Spain had changed the laws of England existing in the province, by

> virtue of which the public domain could be granted to private owners, as early as August 1st, 1781, and in their stead adopted the laws of Spain prevailing in Louisiana; as, if the Spanish king had not done so, his officers had no power to grant. *Having nothing to govern us in ascertaining this fact* but the history of Florida and of its conquest by Spain, it becomes necessary to examine that history, in so far as the same may be judicially noticed, and has any bearing on the claim before us. (Emphasis added.)

After reviewing the diplomatic and military history then available (which included the capture of Mobile by Galvez on March 14, 1780, *id.* at 579), this Court concluded, at the place cited by the Government:

> Nothing is found in these historical details indicating that the Spanish laws had been introduced into Florida, and superseded those of England, and that civil power had been vested in Galvez to grant lands. *As this could only be done directly by the king, all presumptions are opposed to such supposition.* The grant purports to have been made within eighty days after the capitulation of Pensacola; a time, at that day, hardly sufficient to have heard from Spain, after the account of the capitulation reached there, had there been no hostile British fleet intervening to intercept intercourse. But what would seem to be conclusive of the fact is, that Galvez did not assume to grant by any new authority; but did so under his commission as governor of Louisiana; and as this bore date before the conquest, and did not extend to Florida, no such power could be exercised by force of that commission. And not having power to grant merely as a military officer in command, the grant

> could not be made by him, and is void. Nor can we suppose that Galvez made any grant of the date of August 1, 1781, as such assumption would be a reproach on his high standing and intelligence. (Emphasis added.)

Id. at 579-80.

Briefly put, this Court was faced with a question of "fact": Did Galvez have a "commission" from the King of Spain at the time material, authorizing him to act as civil as well as military governor of the Mobile District? Relying on diplomatic and military history within judicial notice in 1851, this Court answered that question of "fact" in the negative. The court of appeals relied on Dr. Baade's report and expertise on the legal history of Spanish North America.[6] Dr. Baade's report, based on published archival evidence now available, establishes beyond doubt that the King had in fact granted Galvez the authority to issue grants in the Mobile area in 1781.

In his Report at page 7 (A. I:158), Professor Baade stated: "The authority of Governor General Galvez to

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[6] Writing in 1985, Judge Morris S. Arnold of the United States Court of Appeals for the Eighth Circuit (himself the leading historian of Spanish Arkansas) referred to the author of respondents' Memorandum on Title to Horn Island as "a law professor who is fast establishing himself as the most eminent of Louisiana's legal historians." Book review, 45 La. L. Rev. 1324, 1326 (1985). Most recently, he has written: "Hans Baade invented colonial Louisiana legal history. Before he started doing research in the eighteenth-century records in New Orleans and elsewhere, virtually no serious historical work involving the judicial and notarial archives of colonial Louisiana had ever been done." Comment, 18 *Cardozo L. Rev.* 585 (1996).

'govern' Mobile was spelled out in a royal Order of February 12, 1781" (citing D. C. Corbitt, "The Administrative System in the Floridas," 1 *Tequesta* [=Journal of the Historical Association of Southern Florida] (No. 2) 41, 42 (August, 1942), where that Order is reproduced in English translation. It reads as follows:

> The King, having considered the great extent acquired by the Province of Louisiana through the conquests that you have made of the English Ports and Settlements on the Mississippi and at Mobile, and having in mind the decorum with which you should be treated as Commander-in-Chief of the Army of Operations at Havana; has been pleased to decree that, for the present, and while you govern Mobile and Louisiana, their administration shall be independent of the Captaincy General of the Island of Cuba, and that Pensacola and its district shall be added to your jurisdiction as soon as they are occupied by the forces of the King, who fully authorizes you to govern and defend them through Substitutes during your absence.

Thus, as of February 12, 1781, Bernardo de Galvez did indeed have authority to "govern" what are now known as the "West Florida Parishes" of Louisiana as well as the Mobile district *in his capacity as Governor of Louisiana*, which had been "exten(ded)" to these lands by acquisition through conquest. In terms of the test laid down by this Court in *Power's Heirs*, *supra*, his "commission" as Governor of Louisiana *did* extend to "Florida" (here, the Mobile District of West Florida), at the time of the grant (August 1, 1781).

Well-documented historical studies as well as Spanish archives now accessible demonstrate that Spanish civil government was established in Mobile immediately after the surrender of the British forces there, that the French-speaking male inhabitants of that district took an oath on March 22, 1780, acknowledging the King of Spain as "notre Legitime Souverain" and themselves as "Bons et fidè les Sujets de Sa Majesté Catholique," and that the English-speaking inhabitants of the District were given eight months to dispose of their goods and to depart from the District with their belongings.[7]

French Louisiana was actually settled from Dauphin Island right next to Horn Island here involved, so that the seeming haste of the "exten(sion)" of Spanish Louisiana to this area appears as a disannexation of lands torn away from French Louisiana less than two decades earlier. Justifiable or not in present-day international law, it was obviously approved by the King of Spain and ratified, in any event, by article 3 of the Treaty of Peace of 1783 which provided that Great Britain was to *cede* East Florida to Spain but that Spain was to "*retain* West Florida." *Power's Heirs* at 579 (emphasis added). Speaking to that

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[7] See, in addition to the sources cited at pp. 7 & 24 of Professor Baade's Memorandum, F. de Borja Medina Rojas, *Jose de Ezpeleta Governador de la Mobila 1780-1781* (1980), especially at 24 with note 28 (Grimarest appointed Civil Commandant of Mobile District); 38 with note 61 (oath of fealty to King of Spain of Francophone male inhabitants of Mobile District, March 22, 1780); and 39-40 with note 62 (oath taken by Anglophone male residents of the District, March 17, 1780). All of these measures were promptly reported to Madrid, and obviously approved by authority.

issue in 1851, this Court did not question the legality of the annexation, but only its basis in Spanish law. We may surmise that the enactment of the "Kearny Code of Laws" by the United States in New Mexico some twenty-one months before the Treaty of Guadalupe Hidalgo was in recent memory at the time.[8]

It remains to add that the decision of this Court in *Power's Heirs* forms part of the corpus of the public land law of the Louisiana Purchase and of subsequent expansion of the United States public domain east of the Mississippi. See most recently *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1169 and 1170 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983), where *Power's Heirs* is quoted for the twin propositions that the Louisiana Land Claims Act "only required persons with 'incomplete title' to file their claims," and that incomplete title exists "when the only evidence of a purported grant of the Spanish governor is a notation in a notary's book." Instead of unsuccessfully challenging the former of these propositions in the courts below, the Government might have urged its novel (or perhaps better, its superannuated) reading of *Power's Heirs* at the appropriate time and in the appropriate forum. The casual manner in which it now casts doubt on all unconfirmed but complete pre-January 20, 1783 Spanish land grants in a tri-State area

[8] The Kearny Code was promulgated on September 22, 1846. The Treaty of Guadalupe Hidalgo was signed on May 30, 1848, and proclaimed on July 4 of that year. See N. M. Stat. Ann. 1978, Ch. 1 (3); 9 Stat. 922.

reflects counsel of desperation rather than concern for historical accuracy and respect for precedent.

CONCLUSION

From the outset, the Government sought to include the Beggerlys' property in the Gulf Islands National Seashore Park. Since the Beggerlys had good title, the Government should have condemned the property and paid just compensation in 1979. Now, almost twenty years later, the Beggerlys have established the validity of their title and the Government is back where it started in the same district court where it filed its quiet title action, and where it would have filed its condemnation suit, with the option of either giving the property back or paying just compensation for it. The Quiet Title Act provides jurisdiction. The Government does not need or deserve further review of this case. The petition should be denied.

Respectfully submitted,

ERNEST G. TAYLOR, JR.
Counsel of Record
ROBERT M. ARENTSON, JR.
Attorney

Supreme Court, U.S.
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(3)

No. 97-731

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CHRIS W. BEGGERLY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-731

UNITED STATES OF AMERICA, PETITIONER

v.

CHRIS W. BEGGERLY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

We explain in our certiorari petition that the court of appeals' decision warrants review because it is erroneous, it conflicts with decisions of this Court and other courts of appeals, and it presents several important questions concerning the stability of judgments and of title to federal lands. Respondents provide no plausible reason why the petition should be denied; in particular, they do not deny that the decision below conflicts with decisions of other courts of appeals on two of the questions presented (see Pet. 16-17, 25-27; cf. Br. in Opp. 8-9, 12-14). Respondents attempt rather to minimize the significance of the questions presented and the errors in the panel's decision, and to suggest that the Fifth Circuit was not bound to follow this Court's decision in *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570 (1851), because this Court supposedly erred in that decision. Those efforts are unavailing.

1. As our petition explains (at 16-19), the panel's decision that an "independent action" brought *against* the United States to set aside a consent judgment entered in a previous civil action brought *by* the United States under 28 U.S.C. 1345 may be premised on "ancillary jurisdiction" deriving from the original civil action, without an independent statutory basis for jurisdiction or waiver of sovereign immunity, conflicts with the decisions of other courts of appeals. If left unreviewed, it could allow the reopening of innumerable judgments in actions long ago settled or litigated to final judgment. Our petition further explains (at 17-18) that such a result causes special concern in cases such as this one involving title to real property, and that this Court has repeatedly recognized that "questions affecting titles to land, once decided, should no longer be considered open." *E.g.*, *Arizona* v. *California*, 460 U.S. 605, 620 (1983).

Respondents do not address, much less dispute the existence of, the conflict among the circuits on this question; nor do respondents address the Court's special concerns "for certainty and predictability where land titles are concerned," *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687 (1979). Rather, respondents contend (1) that "[t]he district court did have ancillary jurisdiction to set aside the consent judgment" because "[t]he court's jurisdiction to hear defensive claims arising out of the same controversy is well established" (Br. in Opp. 8) (citing 7 J.W. Moore, *Moore's Federal Practice* ¶ 60.38, at 60-397 to 60-399 (2d ed. 1995)); and (2) the district court in any event "clearly had jurisdiction under the Quiet Title Act, 28 U.S.C. § 2409a(b), to consider the issues before the court and to ultimately adjudicate title" (Br. in Opp. 9). Neither contention is well founded.

First, as the authors of *Moore's* recognize, (1) "[c]ircuits are split over whether sovereign immunity precludes an independent action against the United States to set aside a judgment," 12 J.W. Moore, *Moore's Federal Practice* ¶ 60.84[1][b], at 60-239 (3d ed. 1997); and (2) "the traditional view is that, whatever jurisdiction a court has to entertain an action for relief from a judgment, the mere fact that the United States is a party to that action 'raises additional jurisdictional issues,'" *ibid.* (citing *United States* v. *Timmons*, 672 F.2d 1373, 1378 (11th Cir. 1982)). The court below clearly departed from that traditional view in deciding that it had jurisdiction over respondents' action to set aside the 1982 consent judgment as a "continuation of the original lawsuit in which jurisdiction was not an issue" (Pet. App. 5a).

Second, nothing in the Quiet Title Act (QTA) authorizes the maintenance of a suit against the United States to set aside a judgment to which the United States was a party. The QTA is a limited waiver of sovereign immunity authorizing suits "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. 2409a(a). Respondents' complaint, moreover, did not request that title be quieted in them, even after they moved to amend their complaint (see Pet. 9). The QTA therefore added nothing to the jurisdiction of the district court to entertain respondents' suit to set aside the judgment in the earlier litigation that they had settled with the United States.

2. Our petition further explains (at 19-24) that the potential instability in titles to federal lands created by the majority's decision is compounded by its erroneous determination that the QTA's 12-year statute of limitations, 28 U.S.C. 2409a(g), is subject to equitable tolling. Respondents do little to address our

submission that the majority's decision cannot be reconciled with the text of the QTA, its history, or the rules governing construction of waivers of sovereign immunity. Rather, they rely entirely on the Ninth Circuit's brief, and erroneous, discussion of those issues in *Fadem* v. *United States*, 113 F.3d 167 (1997), on remand from this Court. See Br. in Opp. 11-12.

The broad significance of the panel's erroneous decision (and that of the Ninth Circuit in *Fadem*) on equitable tolling counsels in favor of review. Respondents incorrectly suggest that review is not warranted because the impact of the decision "will be limited to a portion of Horn Island" (Br. in Opp. 12). To the contrary, the potential impact of the decision extends broadly to otherwise stale claims to federal lands at least throughout both the Fifth Circuit, where the government owns more than 4.7 million acres of land (see United States Dep't of Interior, Bureau of Land Management, *Public Land Statistics—1996*, at 6 (1997) (Table 1-3)), and the Ninth Circuit, where the government owns more than 488 million acres of land (*ibid.*). In both the Fifth and Ninth Circuits, private parties with stale claims to federal lands may now argue that their claims to title should be heard by the courts because of some long-past action or omission by the government that supposedly tolled the statute of limitations.

Respondents contend that the equities favor equitable tolling here because of the supposed failure of the government in the *Adams* litigation to "produce" the Boudreau Grant despite its having been "possessed" by the government (Br. in Opp. 9-10). As our petition explains (at 24 n.18), even if the QTA's limitations period were subject to equitable tolling in some circumstances, no such circumstances are remotely

present here. Respondents do not respond to our showing (Pet. 6, 24 n.18) that the rejected application by the Boudreau heirs for confirmation of the "Boudreau Grant" by a land commission in 1816 was brought to their attention by the government during the *Adams* litigation, yet they admittedly waited nearly a decade following entry of the consent judgment before conducting research into that grant. Moreover, although some of the Commission's records, including a translation of the rejected Boudreau grant, are at the National Archives, there is no evidence that the rejected "grant" itself is or has been in the government's possession, nor have respondents produced an original grant or an actual copy thereof.[1]

3. Our petition explains (at 25-29) that the court of appeals lacked appellate jurisdiction to review the dis-

[1] Respondents make numerous other erroneous factual assertions as well, some of which warrant brief response. Contrary to respondents' assertion that "their ownership" of lands on Horn Island was "generally known and recognized by the * * * federal government" (Br. in Opp. 1), the petition shows (at 4) that the government has openly acted as owner of Horn Island from the early 1800s to the present. Indeed, respondents' own counsel advised them that they could not provide the requisite clear title to the claimed lands to consummate a contract for sale of the lands to the United States because respondents had "no valid claim to ownership of the property" (Pet. App. 43a n.16; see also court of appeals record excerpts (hereafter R.E.) 60). Contrary to respondents' assertion that the $208,175.87 received by them under the 1982 consent judgment was a "nominal settlement" because "[b]oth the Government and [respondents] knew that the market value of the property far exceeded $200.00 per acre" (Br. in Opp. 3), respondents expressly agreed in their settlement document that this amount was "just compensation and in full satisfaction of" their claim to the 729 acres for which their father had paid $82.45 in the 1950 tax sale (see Pet. App. 32a-33a, 58a).

trict court's denial of respondents' motion for summary judgment, and that it compounded its procedural error by quieting title for respondents, in direct conflict with this Court's decision in *Power's Heirs*, *supra*. The petition shows (at 25-27) that there is a conflict among the circuits as to whether a court of appeals may, on appeal from a district court's grant of a dispositive motion terminating the litigation in the defendant's favor, review interlocutory rulings that did not produce the judgment. Respondents do not dispute the existence of that circuit conflict. They assert, however, that the court of appeals had authority to review and reverse the district court's order denying their motion for summary judgment because, they submit, "this case came before the Fifth Circuit on cross-summary judgment motions," as the government's motion to dismiss was "supported by documents, other than the pleadings, which in effect was a summary judgment motion." Br. in Opp. 12.

Respondents' argument rests on an incorrect premise. The government attached copies of the *Adams* litigation documents to its dispositive motion in this case. Those documents were referred to by respondents in *their* complaint and were central to *their* claims. The documents were the United States' complaint in *Adams*, on which respondents' complaint in this case relied as its jurisdictional basis (R.E. 29-46), the *Adams* stipulation and settlement sought to be set aside by respondents (R.E. 46), the *Adams* judgment and order sought to be set aside by respondents (R.E. 46), and the *Adams* order for distribution of funds (R.E. 38). These documents are not "matters outside the pleading" within the meaning of Federal Rule of Civil Procedure 12(b) that convert a motion to dismiss into a motion for summary judgment. As the Tenth Circuit recently held, consistent with all other

circuits that have ruled on the issue, "if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." *GFF Corporation* v. *Associated Wholesale Grocers, Inc.*, No. 96-6287, 1997 WL 730690, at *2 (10th Cir. Nov. 25, 1997) (collecting cases).

Respondents also argue that the court of appeals' review of the district court's denial of summary judgment was appropriate because "the facts are not at issue" in this case (Br. in Opp. 13) and the validity of the Boudreau Grant involves only a legal issue (*id.* at 14). That contention, however, cannot be reconciled with their argument that this Court's ruling in *Power's Heirs*—that Bernardo de Galvez lacked authority on August 1, 1781 (the date of the purported grant by de Galvez of Horn Island to Catalina Boudreau) to issue grants to lands east of the Pearl River (which includes Horn Island)—was a *factual* determination, which (they argue) has now been superseded by the court of appeals' more accurate review of the facts (see *id.* at 17-18). Respondents urge the Court to leave undisturbed the court of appeals' judgment, admittedly in square conflict with *Power's Heirs*, because, in their view, "this [C]ourt had an incomplete record before it" when it decided *Power's Heirs* (*id.* at 15). But respondents cannot consistently contend *both* that the court of appeals' entry of judgment in their favor was proper because no facts were at issue *and* that this Court's conflicting decision should be ignored because it was based on an incomplete record and was therefore factually in error.

Nor, in any event, have respondents produced a credible argument that this Court's decision in *Power's Heirs* was premised on an incomplete record. Respondents rely on a "royal Order of February 12, 1781" (Br. in Opp. 18) for the proposition that de Galvez had been authorized to grant lands east of the Pearl River, presuming that this Court did not have the royal order before it when deciding *Power's Heirs*. But that royal order does not call into question this Court's holding in *Power's Heirs*, for it does not indicate that the requisite civil power to grant lands was vested in de Galvez at the time of the Boudreau Grant.

In *Power's Heirs*, the Court explained:

> [T]he rule is, that laws, usages, and municipal regulations in force at the time of the conquest remain in force until changed by the new sovereign. And this raises the question of fact, whether the king of Spain had changed the laws of England existing in the province, by virtue of which the public domain could be granted to private owners, as early as August 1st, 1781, and in their stead adopted the laws of Spain prevailing in Louisiana; as, if the Spanish king had not done so, his officers had no power to grant.

52 U.S. (11 How.) at 577. The Court proceeded to "examine" the "history of Florida and of its conquest by Spain" (*ibid.*), noted that, "[a]t the date of the grant, Spain held in military occupation the country to the east of the island of Orleans, * * * liable to be divested by reconquest or surrender by a treaty of peace" (*id.* at 579), and concluded that "[n]othing is found in these historical details indicating that the Spanish laws had been introduced into Florida, and superseded those of England, and that civil power had

been vested in Galvez to grant lands. As this could only be done directly by the king, all presumptions are opposed to such supposition" (*ibid.*). Respondents identify nothing in the royal order or in Professor Baade's legal memorandum (upon which the court of appeals improperly relied) in conflict with this Court's conclusion in 1851 that de Galvez lacked *civil* authority to grant lands east of the Pearl River on August 1, 1781.[2]

Although respondents decry the "casual manner" in which the government supposedly "casts doubt" on unestablished pre-1783 land-grant claims (Br. in Opp. 20), it is in fact the court of appeals' decision that has casually unsettled long-established land titles. Not only has the court of appeals allowed parties with stale claims to proceed against the United States under the QTA, but it has cast into doubt this Court's longstanding ruling that de Galvez lacked authority to issue land grants on August 1, 1781, and has therefore revived the possibility of claims to land being asserted on the basis of grants by de Galvez long thought to be invalid. Where, as here, respondents already received $208,175.87 as "just compensation" (Pet. App. 3a, 58a) for their father's "long-term investment" of $82.45 (Br. in Opp. 1), there is no basis for leaving undisturbed the court of appeals' judgment

---

[2] Moreover, respondents wholly ignore our showing in the petition (at 28-29) that, even if de Galvez had authority to issue the Boudreau Grant, respondents would still have to establish that the Grant was consistent with Spanish law at the time, that Catalina Boudreau's heirs had not forfeited their claim, that the United States had not effected an adverse possession of the lands, and that there was a chain of title between the Boudreaus and respondents. The majority simply presumed the establishment of these facts, without any basis, in quieting title for respondents.

that respondents own a portion of Horn Island and are owed compensation for a "taking" that they value at over $10 million plus interest.[3]

* * * * *

For the foregoing reasons and for those set forth in the petition, the petition for a writ of certiorari should be granted.

---

[3] Moreover, this Court has disapproved the presentation of land claims after long delays from the time of the purported land grant on which the claimant relies. As we note in our petition (at 3-4 n.3), Congress in 1844 permitted persons with claims to lands east of the Pearl River "which might have been perfected into a complete title" under a prior sovereign's laws, but for the transfer of sovereignty to the United States, to present their claims to a district court. In *United States* v. *Porche*, 53 U.S. (12 How.) 426, 432 (1852), this Court ruled that the 1844 Act established a jurisdictional bar against any action filed in any court after June 17, 1846, in relation to claims that such a grant was valid. Here, the court of appeals permitted respondents to assert the validity of a claim 150 years after the statutory deadline. Even if the 1844 Act does not establish a jurisdictional bar against consideration of respondents' claims, the Court has repeatedly held that a land claim based on an alleged foreign grant, even if originally valid, is to be considered abandoned when, as here, there has been a great lapse of time before it is asserted. See, *e.g.*, *United States* v. *Hughes*, 54 U.S. (13 How.) 1, 3 (1852) (delay of 36 years to bring suit to enforce Spanish claim held fatal); *Fuentes* v. *United States*, 63 U.S. (22 How.) 443, 460 (1860) (50-year delay); *United States* v. *Repentigny*, 72 U.S. (5 Wall.) 211, 268 (1867) (100-year delay); *United States* v. *Moore*, 53 U.S. (12 How.) 209, 222 (1852) (50-year delay). The Boudreaus themselves made no effort to assert a claim based on the 1781 Grant after its rejection in 1816 by the Commissioner for lands east of the Pearl River. Nonetheless, the court of appeals below permitted respondents to assert a claim based on the Grant more than 180 years after its rejection, even though they have made no showing of a chain of title to the Boudreaus.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1997

Supreme Court, U.S.
FILED
FEB 20 1998
CLERK

(4)

No. 97-731

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CHRIS W. BEGGERLY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioner

ERNEST G. TAYLOR, JR.
Watkins, Ludlam, Winter & Stennis, P.A.
633 North State Street
Jackson, MS 39202
(601) 949-4900

Counsel of Record
for Respondents

PETITION FOR WRIT OF CERTIORARI FILED: OCTOBER 27, 1997
CERTIORARI GRANTED: JANUARY 9, 1998

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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages of the printed appendix to the petition for a writ of certiorari:

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District court's order denying respondents' motion for rehearing (Sept. 21, 1995) 47a
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Court of appeals' substitute opinion on rehearing (July 28, 1997) 1a
Court of appeals' order denying rehearing and rehearing en banc (July 29, 1997) 52a
Final judgment and order in *United States* v. *Adams* 54a
Stipulation and settlement in *United States* v. *Adams* 56a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

Docket No. 94-CV-264

CHRIS W. BEGGERLY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

DOCKET ENTRIES

1994

June	1	(1)	COMPLAINT Filing Fee $120.00 Receipt # 2263; jury demand (db)
			* * * * *
Oct.	11	(6)	ANSWER to Complaint by defendant USA (Attorney Donald M. Waits); CMC memo setting new conference date to 10/17/94 at 11:15 a.m. mailed to all attorneys. (db) [Entry date 10/12/94]

1995

Jan. 17 (15) MOTION by defendant USA to Dismiss (mp)

17 (16) Exhibits supporting government's dispositive motion. (mp)

* * * * *

Mar. 17 (28) MOTION by plaintiff pall for Summary Judgment (Exhibits separate in file) (wl)

* * * * *

17 (29) ITEMIZATON of FACTS by plaintiff pall in support of [28-1] motion for Summary Judgment (Exhibits separate in file) by plaintiff (wl)

July 12 (37) MOTION by the plaintiffs to Amend complaint (mp) [Edit date 07/13/95]

July 26 (38) Response by defendant USA in opposition to [37-1] motion to Amend Complaint. (mp) [Entry date 7/27/95]

* * * * *

Aug. 17 (42) MEMORANDUM ORDER denying [28-1] motion for Summary Judgment (Exhibits separate in file), granting [15-1] motion to Dismiss (signed by Judge Dan M. Russell

Jr.); copies mailed. ob: 1995 page: 1245-1256 (mp) [Edit date 08/17/95]

* * * * *

23 (43) ORDER OF DISMISSAL THAT USA MOTION TO DISMISS IS granted WITH PREJUDICE; plaintiff's motion for summary judgment is DENIED; all pending non-dispositive motions including motion to amend and motion to Strike Sur-Response is DENIED (signed by Judge Dan M. Russell Jr.); copies mailed. (mp)

* * * * *

Sept. 21 (48) MEMORANDUM OPINION and ORDER denying [44-1] motion for Re-Hearing (signed by Judge Dan M. Russell Jr.); copies mailed. ob: 1995 page: 1477-1480 (mp)

* * * * *

Oct. 4 (50) NOTICE OF APPEAL of [43-1] order, [48-1] order by plaintiff Chris W. Beggerly, plaintiff James R. Beggerly, plaintiff Clark M. Beggerly, plaintiff Velma B. Garner, plaintiff Suzanne Reed, plaintiff David Reed. FILING FEE $105.00 RECEIPT # 7631; Appeal record due on 10/19/95 (avm)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60625

CHRIS W. BEGGERLY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

APPEAL FROM THE SOUTHERN DISTRICT OF MISSISSIPPI, BILOXI

DOCKET ENTRIES

1995

Oct.	11	US civil case docketed. NOA filed by Appellant Chris W. Beg gerly, Appellant James R Beggerly, Appellant Clark M Beggerly, Appellant Velma B Garner, Appel lant Suzanne Reed, Appellant David Reed. [95-60625] ROA due on 10/26/95. (cnf)

* * * * *

1996

Jan.	5	Appellant's Brief filed by Appellant David Reed, Appellant Suzanne Reed, Appellant Velma B Garner, Appellant Clark M Beggerly, Appellant James R. Beggerly, Appellant Chris W Beggerly. Copies of brief: 7 # of pages: 47. Sufficient [Y/N]: Y . [95-60625] A/Pet's Brief ddl satisfied. E/Res's Brief due on 2/5/96 for USA. (tjt)
	5	Record excerpts filed by Appellant David Reed, Appellant Suzanne Reed, Appellant Velma B Garner, Appellant Clark M Beggerly, Appellant James R. Beggerly, Appellant Chris W Beggerly # of copies: 7 Sufficient [Y/N]: N Needs Cert. of Service & contains excess pages. [95-60625] Sufficient Record Excerpts due on 1/18/96 for Chris W Beggerly, for James R Beggerly, for Clark M. Beggerly, for Velma B Garner, for Suzanne Reed, for David Reed (tjt)

* * * * *

	29	Amicus curiae brief filed by Amicus Curiae Amer Farm Bureau Fed, Amicus Curiae MS Farm Bureau Fed. Copies of Brief: 7 # of pages: 10. Sufficient [Y/N]: Y. [95-60625]

E/Res's Brief ddl updated to 2/28/96 for USA. (tjt)

29 Amicus curiae brief filed by Amicus Curiae Southeastern Legal. Copies of Brief: 7 # of pages: 8. Sufficient [Y/N]: Y. [95-60625] (tjt)

* * * * *

Apr. 1 Brief filed by Appellee USA. Copies of Brief: 7 # of pages: 37. Sufficient [Y/N]: Y. [95-60625] E/Res's Brief ddl satisfied. Reply Brief due on 4/15/96 for Chris W Beggerly, for James R Beggerly, for Clark M Beggerly, for Velma B Garner, for Suzanne Reed, for David Reed. (tjt)

* * * * *

17 Reply brief filed by Appellant David Reed, Appellant Suzanne Reed, Appellant Velma B Garner, Appellant Clark M Beggerly, Appellant James R Beggerly, Appellant Chris W Beggerly. Copies of Brief: 7 # of pages: 25. Date of COS: 4/14/96 Sufficient [Y/N]: N. wrong color cover. [95-60625] Sufficient Brief due on 4/29/96 for Chris W Beggerly, for James R Beggerly, for Clark M Beggerly, for Velma B Garner, for Suzanne Reed, for

David Reed. Reply Brief ddl satisfied. (mrw)

* * * * *

Sept. 4 Oral argument heard. Case argued by Ernest G Taylor for Appellant Chris W Beggerly, Appellant James R Beggerly, Appellant Clark M Beggerly, Appellant Velma B Garner, Appellant Suzanne Reed, Appellant David Reed, William Brandt Lazarus for Appellee USA [95-60625] (sme)

* * * * *

* * * * *

1997

May 29 Opinion filed. Issd in T form? y Issue Mandate due on 7/21/97. [95-60625] (dse)

29 Judgment entered and filed. [95-60625] (dse)

* * * * *

July 14 Petition filed by Appellee USA for rehearing. # of copies filed: 20. [675254-1] Issue Mandate ddl canceled. [95-60625] (dmd)

14 Suggestion filed by Appellee USA for rehearing en banc. # of copies filed: 20. [675255-1] [95-60625] (dmd)

* * * * *

28 COURT Order filed denying petition for rehearing [675254-1]; further denying suggestion for rehearing en banc [675255-1]. With poll (Y/N)?: N. Issue Mandate due on 8/4/97. (HAP) Copies to all counsel. [95-60625] (dmd)

28 Opinion withdrawn. opinion [634990-1] [95-60625] (dse)

* * * * *

28 Opinion filed. Iss'd in T form? y [95-60625] (dse)

28 Judgment entered and filed. [95-60625] (dse)

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. 1:94CV264RR

CHRIS W. BEGGERLY, JAMES R. BEGGERLY, CLARK M. BEGGERLY, JR., VELMA B. GARNER, SUZANNE REED AND DAVID REED, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 1, 1994]

COMPLAINT

Come now Plaintiffs, the heirs of Clark M. Beggerly, Sr. and members of his family including Chris W. Beggerly, James R. Beggerly, Clark M. Beggerly, Jr., Velma B. Garner, Suzanne Reed and David Reed (hereinafter the "Beggerlys" or the "Beggerly family"), who bring this their suit against the Defendant, United States of America ("United States"). In support of their complaint the Beggerlys allege the following:

Jurisdiction

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution, laws and treaties of the United States.

2. Further, this Court has jurisdiction because this action is ancillary to the action filed by the United States in 1979 in *United States of America v. Adams, et al.*, Civil Action No. S79-0338(R) (hereinafter the "*Adams-Beggerly* suit").

Jury Trial Requested

Parties

3. Clark M. Beggerly, Sr., deceased, was a train engineer for the Illinois Central Railroad. He had five children, Chris W. Beggerly, James R. Beggerly, Clark M. Beggerly, Jr., Velma B. Garner, all of whom are plaintiffs, and Norma B. Reed, who is deceased. The other two plaintiffs, Suzanne Reed and David Reed, are the children of Norma B. Reed and grandchildren of Clark M. Beggerly, Sr.

4. The defendant is the United States of America which owns approximately 723 million acres of land, which is about one-third of the nation's total land area. It owns 1,759,000 acres of land in the State of Mississippi which is approximately 6% of the State's total land area. For purposes of the *Adams-Beggerly* suit, the United States acted through its Department of Interior and Bureau of Land Management which acquire and manage land for the United States. In 1979, when the *Adams-Beggerly* suit was filed, the appropriation for the Department of Interior was $8,300,000,000. In the current fiscal year, the Department of Interior has an appropriation of $13,400,000,000.

Facts

5. On April 3, 1950, certain properties in Jackson County, Mississippi, were placed on sale at the Jackson County Courthouse in Pascagoula, Mississippi, for delinquent taxes.

6. Clark M. Beggerly, Sr., who was interested in making a long-term investment for the benefit of his family, attended the Jackson County tax sale and purchased approximately 626 acres on Horn Island, Jackson County, Mississippi, in the name of his son, James R. Beggerly. This acreage is described as Lots 1, 2, 3 and 4, Section 27, Township 9 South, Range 6 West; Lots 1, 2, 3 and 4, Section 28, Township 9 South, Range 6 West and Lots 1, 2, 3 and 4, Section 29, Township 9 South, Range 6 West. Also, Clark M. Beggerly, Sr. and A. E. Hurd purchased approximately 225 acres described as Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, Section 30, Township 9 South, Range 6 West.

7. On July 18, 1960, A. E. Hurd and Clark M. Beggerly, Sr. divided their jointly owned property. Clark M. Beggerly, Sr. conveyed Lots 5, 6, 7, 8 and 9 to A. E. Hurd and A. E. Hurd conveyed Lots 1 through 4 and Lot 10 to Clark M. Beggerly, Sr. Thereafter, Clark M. Beggerly, Sr. died leaving his interest in said lots to his wife, Norma A. Beggerly. On March 24, 1971, Mrs. Norma A. Beggerly conveyed these same lots to her children Clark M. Beggerly, Jr., Chris W. Beggerly, James R. Beggerly, Norma B. Reed and Velma B. Garner. Subsequently, Norma Reed died leaving her interests to her children, Suzanne and David.

8. But for the wrongful taking by the United States, the current interest of each plaintiff in the Horn Island property is as follows:

(a) James R. Beggerly owns a 100% interest in Lots 1, 2, 3 and 4, Section 27, Township 9 South,

Range 6 West; Lots 1, 2, 3 and 4, Section 28, Township 9 South, Range 6 West; and Lots 1, 2, 3, and 4, Section 29, Township 9 South, Range 6 West. He also owns an undivided one-fifth interest in Lots 1, 2, 3, 4 and 10 of Section 30, Township 9 South, Range 6 West.

(b) Chris W. Beggerly owns an undivided one-fifth interest in Lots 1, 2, 3, 4 and 10 of Section 30, Township 9 South, Range 6 West.

(c) Clark M. Beggerly, Jr. owns an undivided one-fifth interest in Lots 1, 2, 3, 4 and 10 of Section 30, Township 9 South, Range 6 West.

(d) Velma B. Garner owns an undivided one-fifth interest in Lots 1, 2, 3, 4 and 10 of Section 30, Township 9 South, Range 6 West.

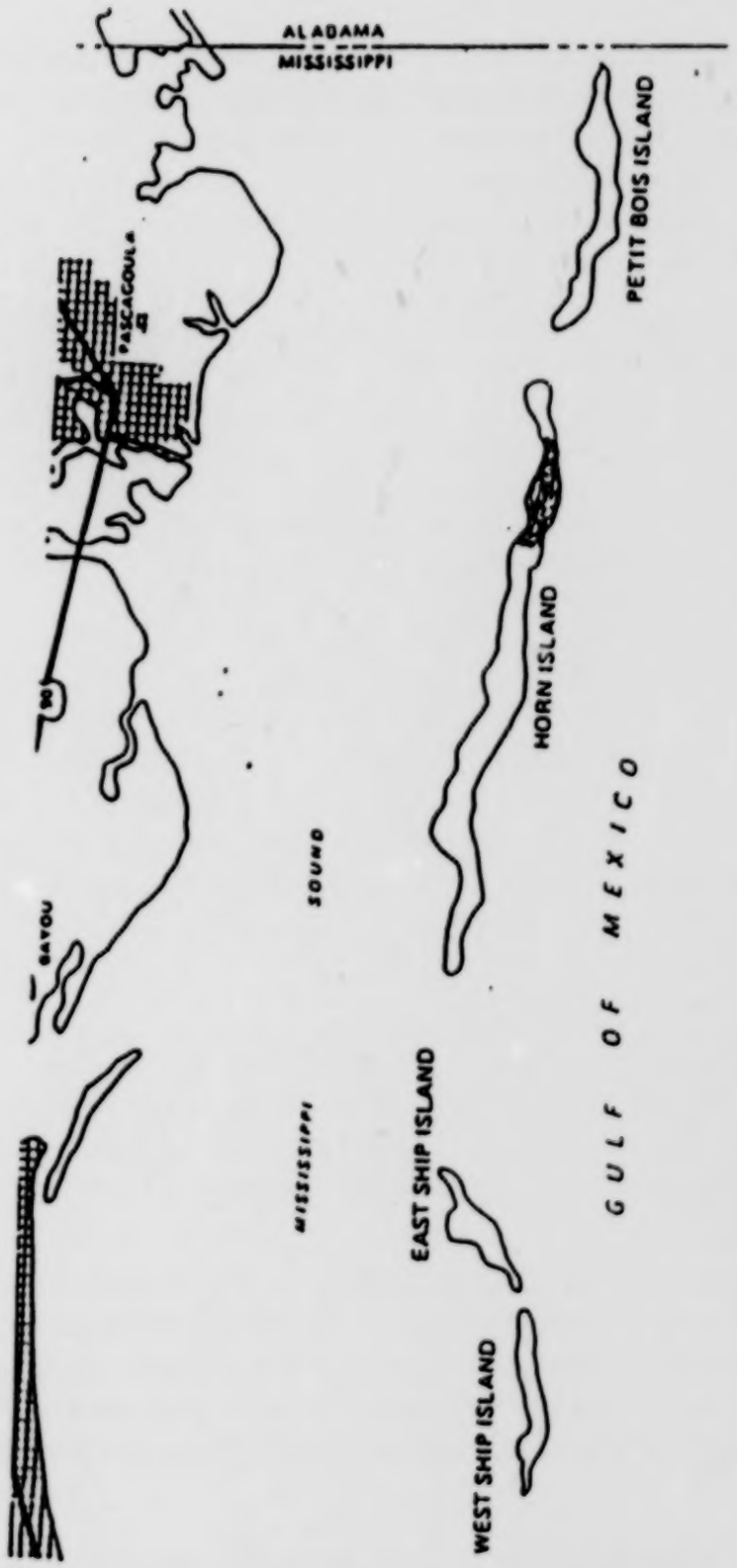
(e) Suzanne Reed owns an undivided one-tenth interest in Lots 1, 2, 3, 4 and 10 of Section 30, Township 9 South, Range 6 West.

(f) David Reed owns an undivided one-tenth interest in Lots 1, 2, 3, 4 and 10 of Section 30, Township 9 South, Range 6 West.

9. Horn Island is in Jackson County, Mississippi, about 13 miles southwest of the City of Pascagoula. Immediately to the East is Petit Bois Island and to the West is Ship Island. Horn Island is the largest of the three islands. It is approximately 14 miles long and one-half to three-fourths of a mile wide. The following map shows the location, size and shape of the three islands.

[Following]

*** Beggerly Property**



10. As indicated above, the Beggerly property is located on the east end of the island and fronts both the Gulf of Mexico and the Mississippi Sound. It includes more than three miles of beach front on the Gulf of Mexico and more than three miles of beach front on the Mississippi Sound.

11. After duly buying the subject land in 1950, the Beggerly family continually paid city and county ad valorem taxes on this property, exercised open, notorious, actual and continuous possession and enjoyed quiet and peaceful fee simple ownership of this property until 1979 when the United States wrongfully filed suit challenging their ownership.

12. On January 8, 1971, the United States Congress adopted legislation authorizing the Department of Interior to develop a new federal park made up of barrier islands including Horn, Petit Bois and Ship Islands to be known as the Gulf Islands National Seashore. The purpose of the Act was to protect the natural, historic and recreational values of the islands. Pub.L. 91-660; 84 Stat. 1967. (Codified at 16 U.S.C.A. 459h to 459h-10; hereinafter the "Gulf Islands Act" or "Act").

13. Consistent with the natural preservation objective stated in the Gulf Islands Act, the Department of the Interior in 1978 stated the following in its Environmental Impact Statement (hereinafter "EIS"):

> Acquisition of the privately owned undeveloped lands will prevent new individuals from living within the relatively undisturbed Seashore area. The acquisition of undeveloped private lands within the Seashore will also preclude the buying and marketing of such parcels in speculation and the resulting economic gains to persons involved in buying and selling.

EIS p.200.

14. The Act authorized the Department of Interior to acquire property for the park through three means: (1) transfer of title from other federal agencies to the Department of Interior; (2) donation of property from the states or private landowners; and (3) acquisition from private landowners.

15. The Act as adopted in 1971 provided an appropriation of $3,120,000 for acquisition of 400 acres of land. Consistent with the rapidly escalating land values in the area and the need to acquire more private land this appropriation was increased in 1972 to $3,462,000 and in 1976 to $22,162,000. As of 1978, the Department of Interior planned to purchase 1,325 acres of private land, acquire over 5,000 acres by transfers from other federal agencies that had title to the property and receive by donation 39,000 acres of submerged lands from the State of Florida.

16. In the mid 1960s, developers began a trend of developing barrier islands into recreational and resort properties along the southeast seacoast in response to a growing demand. First, islands along the southern Atlantic Seacoast were developed. By the early 1970s, development of barrier islands along the Florida Gulf Coast had begun. By late 1979, the trend had reached the Mississippi Gulf Coast as development of Petit Bois Island began. The success of these ventures indicated a strong market demand and the opportunity for substantial profits for developers, investors, homeowners and landowners.

17. From 1971 to 1979 extensive development occurred along the Gulf Coast of Florida, Alabama, Mississippi and Texas. Rapid development occurred in the recreation and second home market and the tourist industry grew dramatically. Mississippi economic forecasts made in the late 1970s anticipated continued rapid recreation, tourist and population growth through 1985.

18. Spurred by this dynamic development trend, the Department of Interior began taking steps to acquire title to the Mississippi barrier islands to prevent development of these islands and to assure that they would be preserved in their natural state consistent with the objectives of the Gulf Islands Act. On September 7, 1979, the United States sued the Beggerlys and certain other property owners on Horn, Ship and Petit Bois Islands in an effort to take their properties for the Gulf Island National Seashore. However, the United States did not file a condemnation suit and offer to pay the landowner the fair market value of their properties. It, instead, claimed that the Beggerlys and other defendants, all record title owners, did not have valid titles; that the United States had acquired title to these properties through the Louisiana Purchase in 1803; and that the United States had never issued patents or otherwise conveyed its interest to the State of Mississippi or to any private party.

19. In its suit against the Beggerlys, the United States demanded that the court determine that the Beggerlys and other defendants had no "right, title or interest" in and to their lands; that the Beggerlys and other defendants be permanently prohibited from entering upon or using their lands, and that they be

required to remove all improvements, if any, from said lands and to restore the lands to the condition they were in "prior to their unlawful entrance thereon." *Adams-Beggerly* Complaint, p.5.

20. The Beggerlys were shocked and dismayed when the federal marshal served them with the complaint. In their prior contacts with representatives of the United States Government during the early 1970s, the United States had acknowledged the Beggerlys' ownership and had even offered to buy the property. Then, out of the blue, and in total contrast with all of their prior dealings, the United States sued claiming the Beggerlys had no title and offering to pay nothing, not one cent. Since the Beggerlys had bought their property as a long-term investment almost thirty years earlier, had regularly paid the ad valorem taxes on it, had received no income from it and now were in a position to recognize a reasonable profit, the timing added insult to injury.

21. Though their resources were limited and they had to work on their defense during their limited free time from full-time jobs, the Beggerlys were determined to defend their title and property rights. They hired a lawyer who did extensive research of the pertinent land records and the law. They hired an expert who researched land records in Washington, D.C. Meanwhile, members of the family did research at the Mississippi Archives, the Archives in Mobile, Alabama and at various federal offices in the Washington, D.C. area. However, research was difficult. Settlement along the Mississippi Gulf Coast began with the landing of Sieur D'Iberville in 1699. From that time until Mississippi became a state in 1817, four sovereign nations ruled this area, each of

which made grants to private landowners which could be pertinent to the validity of current land titles. However, there is no central repository for these records and no general index or guide which can be used to assure that all pertinent records needed for research can be located. Requests to the United States' own agencies for any knowledge of a valid patent or grant were met with denials that such documents existed.

22. Nevertheless, the Beggerlys, their lawyers and experts made a diligent effort and succeeded in finding extensive evidence of private ownership, possession, use and occupancy of Horn Island from the eighteenth century forward. However, as the trial date approached, they did not have a valid patent or grant to support their title.

23. Faced with the United States' continual and unwaivering representation to the Court that there was no valid grant or patent to support the Beggerlys' title, and having no hope of producing the all important grant or patent by the trial date, the Beggerlys realized the futility of going to trial. On December 3, 1982, they accepted a nominal settlement of approximately $200 per acre. The United States paid the settlement to cover their litigation costs, time and trouble, but not one cent for the purchase of the Beggerlys' title. The Court, having no evidence of a valid patent or grant, and being assured by the United States that no such document existed, entered an order finding that the United States had title to the Beggerly property and that the Beggerlys were permanently prohibited from asserting any claim against the property.

24. Meanwhile, on the neighboring Petit Bois Island, which was also a part of the Gulf Islands National Seashore, a related but significantly different story was developing. On May 16, 1980, only a few months after suit was filed against the Beggerlys, the United States sued the owners of 717.42 acres of land on Petit Bois. In contrast to the *Adams-Beggerly* suit, in the *Petit Bois* suit the United States recognized the validity of the private title and its obligation to pay the landowners fair market value. *United States v. 717.42 Acres of Land*, Civil Action No. S80-0450(N), United States District Court, Southern District of Mississippi, Southern Division (hereinafter "the *Petit Bois* suit").

25. After extensive pretrial proceedings, the *Petit Bois* suit was tried and judgment entered as to the surface value on March 29, 1982. The total amount of this judgment was $6,120,000 plus interest from the date the suit was filed. This is an award of approximately $8,500.00 per surface acre. Subsequently, a separate valuation hearing on the mineral interest was held and an additional $1,071,534.00 plus interest was awarded for a 25 percent interest in the mineral rights. This is an award of $5,976 per acre for the fair market value of a 100 percent mineral interest. Therefore, when the $8,500 per acre surface award is added to the $5,976 per acre mineral award the total per acre award is $14,476.

26. Though the Beggerlys were outraged and disgusted with the outcome of their lawsuit, particularly in light of the Petit Bois development, they were convinced from all the evidence of private ownership over the centuries that there must be a valid grant or patent somewhere and they were

determined to find it. Therefore, they continued their search in the archives at Mobile, Alabama, the Mississippi State Archives, the Spanish Archives in New Orleans and at the National Archives in Washington, D.C. They contacted United States Congressmen, United States Senators, Secretaries of the Interior for three administrations and numerous other state and federal public officials and used Freedom of Information Act Requests to assist in gaining access to documents that might help. Finally, in 1992, after thirteen years of continuous, diligent effort, they found what they were looking for in the possession of the United States itself. In fact, they found the critical evidence, a 1781 grant of Horn Island, made by Bernardo de Galvez, Governor General of Spanish Louisiana to Catalina Boudreau, in the National Archives.

27. Believing that this grant confirmed their title, they sent it to the Department of Interior, Bureau of Land Management, and asked that it reconsider their title in light of this grant. On November 20, 1992, the Bureau of Land Management ("hereinafter BLM") denied that their newly discovered grant would help them prove their title. The BLM's comments are summarized at the end of its letter as follows:

> To summarize, the BLM finds that you do not have a valid claim to any land or minerals on Horn Island and that, therefore, you are not entitled to the patents you have requested. The land in question is owned by the Federal Government and has been since 1803, when it came into the U.S. as part of the Louisiana Purchase. Any claim you may have had was disposed of by your decision to settle the quiet title action in 1982. There is no

> affirmative evidence that the Spanish land grant you provided was ever properly confirmed and without such evidence the 1982 judgment stands and BLM is without power to issue you a patent.
>
> . . . .
>
> We have thoroughly researched your claims to the land on Horn Island and both management and staff have spent countless hours reviewing the facts in this case. We have also been working closely with the Solicitor's Office, which concurs in our decision and in this letter.
>
> It is our position that the BLM has done all that we can to assist you in finding answers to your lingering questions. At this point, we do not feel there is anything else we can do to assist you and this letter represents our final decision in this matter. If you still feel you have been wronged, your only recourse is through the U.S. judicial system.

28. Having exhausted administrative avenues, the Beggerlys, at substantial personal expense, again hired counsel to assist and advise them. Counsel, in turn, identified and hired experts to determine the authenticity and validity of the grant. Ultimately, they employed Dr. Hans Baade, a professor of international law at the University of Texas and a preeminent expert on early Spanish grants and their effect on United States land titles.

29. After careful study of the grant and other documents provided by the Beggerlys and records developed through his independent research, Dr.

Baade determined that the grant was authentic and that it was a valid grant of Horn Island to Ms. Boudreau. He further advised that through the Treaty of Amity, Settlement and Limits with Spain, 8 Stat. 252, signed in Washington on February 2, 1819 and approved and ratified by Spain on February 22, 1821, the United States had accepted the validity of this 1781 grant and that the United States confirmation hearings in the 1820s, subsequent to the Louisiana Purchase of 1803, had no bearing on this prior valid grant.

30. Therefore, by virtue of the Boudreau grant, Horn Island was in fact and law private property and consequently the Jackson County tax collector had authority to sell and did in fact sell a valid title to the subject property to Clark M. Beggerly, Sr. at the tax sale in 1950.

31. The Boudreau grant was found in the National Archives in Washington, D.C., in Volume 203, Land Claims East of the Pearl River, Evidence Book B, Item 126. It was part of the record of the First Report of the Land Commissioner East and West of the Pearl River, on Private Land Claims of January 5, 1816. The Boudreau grant and related documents have continuously been in the custody and control of the United States since 1816.

32. In fact, the Department of Interior, the department in charge of establishing the Gulf Islands National Seashore, was at the time that it sued the Beggerlys in charge of the government entity which had received, reported on, and archived the Boudreau grant in 1816.

COUNT 1

Fraud

33. The plaintiffs incorporate by reference Paragraphs 1 through 32 above.

34. The United States represented to the court, the Beggerlys and other defendants that the United States had always owned the Beggerly property on Horn Island and that there had never been a valid grant or patent of that property putting it into private ownership.

35. The existence of the Boudreau grant was material, in fact decisive, evidence in the *Adams-Beggerly* suit.

36. The United States, which had the Boudreau grant in its possession and under its control at all times, had a duty to disclose the existence of this grant to the Beggerlys and the Court. However, the United States, through its willful blindness and conscious avoidance of its affirmative obligation to thoroughly search its records and make full disclosure to the Court, failed to reveal the existence of this grant to the Court and to the Beggerlys. Therefore, the United States, whether wittingly or not, perpetrated a fraud on the Court and the Beggerlys.

37. In addition to its failure to affirmatively disclose the Boudreau grant, the United States, through its abysmal failure to organize and index the early colonial land grants, suppressed the existence of the Boudreau grant and thereby fraudulently concealed its existence from the Court and the Beggerlys.

38. After the Beggerlys discovered the Boudreau grant in 1992 and presented it to the Department of Interior, the United States fraudulently misrepresented its legal significance to the Beggerlys, continuing a pattern of misrepresentation and suppression of the truth.

39. Now that the Beggerlys have discovered the Boudreau grant, they have a solid winning defense to the alleged cause of action on which the *Adams-Beggerly* judgment was founded.

40. Because of this pattern of active or constructive fraud by the United States, the Beggerlys were prevented from presenting their defense to the court and obtaining the benefit of the defense.

41. The Beggerlys have continuously and diligently used all means and resources available to them to locate the Boudreau grant and present it to the proper officials. The Beggerlys have in fact gone above and beyond what any reasonable person would be expected to do under the circumstances.

42. The Beggerlys have no adequate remedy at law until and unless the Court sets aside the settlement agreement and judgment in the *Adams-Beggerly* suit.

43. The Beggerlys demand that this Court exercise its equitable powers and grant them relief from the *Adams-Beggerly* settlement and judgment and permit them to go forward with presenting evidence of their damages.

COUNT II

Mutual Mistake

44. The plaintiffs incorporate by reference paragraphs 1 through 43 above.

45. In the alternative, the United States' misrepresentations made to the Court and the Beggerlys were caused by the United States' gross negligence and mistake which the Beggerlys and the Court relied upon in accepting the settlement and judgment. Therefore, the acceptance of the settlement and entry of the judgment were based upon a mutual mistake of a material fact not caused by the fault or negligence of the Beggerlys. Under the Court's equitable powers, both the settlement and entry of judgment should be set aside to permit the Beggerlys to go forward with presentation of their damages.

COUNT III

Inverse Condemnation

46. The allegations of preceding paragraphs 1 through 45 are incorporated by reference.

47. The entry of judgment on December 3, 1982 in the *Adams-Beggerly* case constituted a taking of the Beggerly property without the payment of just compensation.

48. The United States had authority to use condemnation powers to take the Beggerlys' property for the Gulf Island National Seashore.

49. The United States, in lieu of condemnation, took the Beggerlys' property through the quiet title actin and the entry of judgment as aforesaid.

50. The Beggerlys have a constitutional right to just compensation for their property. The Beggerlys are entitled to be paid fair market value for their surface and mineral interests under condemnation principles.

51. The Beggerlys own 100 percent of the surface and mineral interests as described in paragraph 8, above.

52. As of December 3, 1982, the fair market value of the Beggerly property was not less than $14,500 per acre, the about amount awarded for the neighboring Petit Bois property.

53. The Beggerlys are entitled to be paid interest from and after the date of the taking, December 3, 1982, to the present on the fair market value of their property.

54. The Beggerlys are entitled to be paid attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. Section 2412(d).

Now therefore the Beggerlys do hereby request the Court to set aside the judgment in the *Adams-Beggerly* suit entered December 3, 1982, set aside the underlying settlement and, after conducting a hearing to determine the fair market value of the Beggerlys' property, award them damages of not less than $14,500 per acre plus interest from December 3, 1982 and reasonable attorneys' fees.

This, the 31st day of May, 1994.

Respectfully submitted,

THE BEGGERLY FAMILY
By Their Attorneys

By: /s/ ERNEST G. TAYLOR, JR.
ERNEST G. TAYLOR, JR.

Ernest G. Taylor, Jr. (MB #7451)
Jim B. Tohill (MB #8234)
Robert E. Hauberg, Jr. (MB #8958)
Robert M. Arentson, Jr. (MB #1612)
Watkins Ludlam & Stennis
633 North State Street
Post Office Box 427
Jackson, Mississippi 39205-0427
(601) 949-4900

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action Number: 1:94cv264RR

CHRIS W. BEGGERLY, ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: Oct. 11, 1994]

ANSWER

The United States answers the complaint of plaintiff as follows:

1. Paragraph 1 is a conclusion of law and does not require an answer.

2. Paragraph 2 is a conclusion of law and does not require an answer.

3. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 3 and therefore deny the same.

4. Admit that the defendant is the United States of America. The balance of paragraph 4 is redundant and immaterial and does not require an answer.

5. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 5 and therefore deny the same.

6. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 6 and therefore deny the same. In addition, the allegations of paragraph 6 are redundant and immaterial and does not require an answer.

7. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 7 and therefore deny the same. In addition, the allegations of paragraph 7 are redundant and immaterial and does not require an answer.

8. Deny the allegations of paragraph 8.

9. Admit paragraph 9.

10. Admit paragraph 10.

11. Deny that the defendant wrongfully filed suit. As to the remainder of paragraph 11, defendant is without sufficient knowledge to admit or deny the those allegations and therefore deny the same. In addition, the remaining allegations of paragraph 11 are redundant and immaterial and does not require an answer.

12. Admit that Congress passed Pub. L. 91-660, 16 U.S.C. §§ 459h et seq. Such act speaks for itself and deny any interpretation placed thereon.

13. Admit that the defendant prepared an Environmental Impact Statement. Such EIS speaks for itself and deny any interpretation placed thereon.

14. Paragraph 14 is a conclusion of law and does not require an answer.

15. The first sentence of paragraph 15 is a conclusion of law and does not require an answer. As to the remaining allegations of paragraph 15, defendant is

without sufficient knowledge to admit or deny the allegations of paragraph 15 and therefore deny the same. In addition, the remaining allegations of paragraph 15 are redundant and immaterial and does not require an answer.

16. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 16 and therefore deny the same. In addition, the allegations of paragraph 16 are redundant and immaterial and do not require an answer.

17. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 17 and therefore deny the same. In addition, the allegations of paragraph 17 are redundant and immaterial and do not require an answer.

18. Defendant is without sufficient knowledge to admit or deny the allegations of the first sentence of paragraph 18 and therefore deny the same. In addition, the allegations of the first sentence of paragraph 18 are redundant and immaterial and do not require an answer. The defendant affirmatively alleges that, on September 7, 1979, United States filed a quiet title action, *United States of America v. Adams, et al*, in the U.S. District Court for the Southern District of Mississippi, Civil action No. S 79-0338 (C). The complaint speaks for itself and defendant denies any interpretation place thereon. Any allegations of paragraph 18 not previously answered are hereby denied.

19. The complaint in the *Adams* case speaks for itself and defendant denies any interpretation place thereon. Any allegations of paragraph 19 not previously answered are hereby denied.

20. The allegations of paragraph 20 are immaterial and impertinent and do not require an answer.

21. Defendant is without sufficient knowledge to admit or deny the allegations of the first five sentences of paragraph 21 and therefore deny the same. In addition, the allegations of the first five sentences of paragraph 21 are redundant and immaterial and do not require an answer. Admit the remainder of paragraph 21.

22. Admit the last sentence of paragraph 22. As to the remainder of paragraph 22, defendant is without sufficient knowledge to admit or deny the allegations and therefore deny the same. In addition, the remaining allegations are redundant and immaterial and do not require an answer.

23. Defendant affirmatively alleges that plaintiffs' predecessors in interest and the United States entered into a stipulation and settlement on December 3, 1982 which was filed with the court. Based upon this stipulation and settlement, the court entered its order on December 3, 1982 in which it quieted title to the subject property in the United States, ordering that the United States "has title in fee simple absolute." As part of the settlement, the United States paid the Beggerly plaintiffs $208,175.87, plus attorney's fees and costs to their attorney, James L. Martin. Mr. Martin, who represented other defendants, received a total of $45,308.65. Any allegation of paragraph 23 not previously answered is hereby denied.

24. The allegations of paragraph 24 are immaterial and impertinent and do not require an answer.

25. The allegations of paragraph 25 are immaterial and impertinent and do not require an answer.

26. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 26 and therefore deny the same. In addition, the allegations of paragraph 26 are redundant and immaterial and do not require an answer.

27. In response to paragraph 27, Defendant affirmatively alleges that the materials plaintiffs presented to the Department of the Interior as newly found evidence did not establish proof of a valid claim to title in the property prior to the quiet title judgment. Admit that the Defendant of the Interior did write a letter to plaintiffs, which letter speaks for itself.

28. Paragraph 28 does not require a response.

29. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 29 and therefore deny the same. In addition, the allegations of paragraph 29 are redundant and immaterial and do not require an answer.

30. Deny Paragraph 30.

31. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 31 and therefore deny the same.

32. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 32 and therefore deny the same.

33. Defendant incorporates by reference its responses to paragraphs 1 through 32 above.

34. The representations of the United States in the *Adams* case are a matter of public record and speaks for itself. Deny any interpretation placed thereon by plaintiffs.

35. Deny paragraph 35.

36. Deny the first and last sentences of paragraph 36. The remaining allegations of paragraph 36 are immaterial and impertinent and do not require an answer.

37. Deny paragraph 37.

38. Deny paragraph 38.

39. Deny paragraph 39.

40. Deny paragraph 40.

41. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 41 and therefore deny the same. In addition, the allegations of paragraph 41 are redundant and immaterial and do not require an answer.

42. Paragraph 42 is a conclusion of law that does not require a response.

43. Paragraph 43 does not require a response.

44. Defendant incorporates by reference its responses to paragraph 1 through 43 above.

45. Deny paragraph 44.

46. Defendant incorporates by reference its responses to paragraphs 1 through 45 above.

47. Paragraph 47 is a conclusion of law that does not require a response.

48. Admit that the United States generally possesses the power to condemn property. Deny that the

Beggerlys owned any property within the Gulf Island National Seashore.

49. Deny paragraph 49.

50. Paragraph 50 is a conclusion of law that does not require a response.

51. Deny paragraph 51.

52. Defendant is without sufficient knowledge to admit or deny the allegations of paragraph 52 and therefore deny the same.

53. Deny paragraph 53.

54. Deny paragraph 54.

Any allegation of plaintiff's complaint not previously admitted or denied is hereby denied.

AFFIRMATIVE DEFENSES

1. The complaint of plaintiffs fails to state a claim for which relief can be granted.

2. In *United States of America v. Adams, et al*, U.S. District Court for the Southern District of Mississippi, Civil action No. S 79-0338 (C), ("*Adams* Case") the court entered a Judgment and Order on December 3, 1982, which determined that the United States had and has title in fee simple absolute to the property and the subject of this litigation. This Judgment and Order of this court is res judicata to the issues raised herein and preclude plaintiffs from relitigating the issue of title.

3. In the order entered by this court in the *Adams* Case on December 3, 1982 referred to above, the court further ordered:

> FURTHER ORDERED that all defendants and their heirs are permanently enjoined from asserting any adverse claims to the subject property described in the Complaint * * *

By continuing to assert title and adverse claims to the fee simple ownership of the United States, by filing this action and by other acts, plaintiffs are in violation of this court's order.

4. No mutual mistake of fact occurred relating to the Stipulation and Settlement executed on December 3, 1982 or the judgement and order entered December 3, 1982 in the *Adams* Case. If, arguendo, such a mutual mistake did occur, it cannot be raised after one year after entry of judgment pursuant to Rule 60(b), F.R.Civ.P.

5. Defendant did not commit fraud upon plaintiffs or their predecessors in interest in relation to the Stipulation and Settlement executed on December 3, 1982 or the judgement and order entered December 3, 1982 in the *Adams* Case. If, arguendo, such fraud did occur, it cannot be raised after one year after entry of judgment pursuant to Rule 60(b), F.R.Civ.P.

6. Plaintiffs have received fair and just compensation for any claim of interest in the property. In exchange for the Stipulation and Settlement executed on December 3, 1982 or the judgement and order entered December 3, 1982 in the *Adams* Case, plaintiffs were paid $208,175.87, plus attorney's fees and costs. Plaintiffs cannot seek equity while retaining such just compensation.

7. Since plaintiffs claim for inverse compensation exceeds $10,000, this court lacks jurisdiction to hear the action.

8. It is not in the interest of justice to transfer this action to the Court of Federal Claims since plain-

tiffs' claim arose prior to six years prior to the bringing of this action and is therefore barred by the statute of limitations, 28 U.S.C. § 2501.

9. Pursuant to the Assignment of Claims Act, 31 U.S.C. § 3727, plaintiff lacks standing to assert claims or seek recovery for the taking of some or all of the land which is the subject matter of the complaint.

WHEREFORE, defendant prays that plaintiffs take nothing as a result of its complaint, that judgment be entered in favor of defendant, that the complaint of plaintiffs be dismissed with prejudice, that defendant be awarded costs, and for such other and further relief as is just.

Dated: October 11, 1994.

Respectfully submitted,

GEORGE PHILLIPS
United States Attorney

/s/ DONALD M. WAITS
DONALD M. WAITS
Assistant U.S. Attorney
P.O. Box 1417
Biloxi, MS 39533
(601) 432-5521
Mississippi Bar No. 6859

STUART B. SCHOENBURG
General Litigation Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 663
Washington, DC 20044-0663
(202) 272-8207

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. 579-0338 (C)

UNITED STATES OF AMERICA, PLAINTIFF

v.

DR. ANDREW J. ADAMS, JESSE J. ALLEN, SHELTON P. ALLEN, DR. DEWEY ANDERSON, ARTHUR BAKER, RALPH J. BAKER, RAYMOND BASS, C. M. BEGGERLY, CHRIS W. BEGGERLY, CLARK M. BEGGERLY, JR., JAMES R. BEGGERLY, J. R. BEGGERLY, NORMA A. BEGGERLY, BERNARD J. BENNETT, ORA C. BENNETT AND ROBERT A. BENNETT, ANTHONY J. AND GRACE B. BERTUCCI, JOE K. BISHO, T. G. BLACKWELL, JAKE BLUM, CLYDE BOSORGE, G. F. BOSTWICK, GORDON S. BOWDISH, DAN E. BRELAND, MARGARET M. BROU, H. G. BROWN, GILLES G. AND GERDA L. BROY, CARLOS BUFFINGTON, MICHAEL AND LOUISE BUMBURA, ALAN BURIN, KATHERINE V. BUSCH, MARYANN S. BYRD, [MAY OR MARY] ANN CAMPBELL, WILLIAM D. CARROLL, SR., GEORGE CASTIGLIOLA, PAUL CHAMBERS, GEORGE AND SOFIA COLLETTE, W. M. COLMER, JERRY, JR. AND SHANNON R. COVICH, WILLIAM CRUSO, A. W. CAUACEVICH, MARY ANN CUMMINGS, BETTY CURTIS, F. P. CURTIS, GENEVIEVE W. CURTIS, LEWIS E. CURTIS, L. E. CURTIS, JR., WAKEMAN B. CURTIS, W. B. CURTIS, D & N EXCLUSIVE PROPERTIES, A LOUISIANA COMPANY, HOMER B. DAVIS, JR., ROGER P. AND GEORGE C. DAY, 1 CONSTITUTION PLAZA, E. J. DELCAMBRE, DELTA SALES CORPORATION, NOW KNOWN AS FINE VINES, INC., A MISSISSIPPI CORPORATION, W. W. DIBBLE, DAVID A. AND

ADELAIDE H. DOHERTY, J. E. AND CHRISTINA S. DUNBAR, CLYDE R. DUNNAWAY, DR. CLAY EASTERLY, C. H. EISENDRATH, H. P. FLATEAU (ESTATE OF), JIM FOKAKIS, LOUIS FONDREN, MICHAEL L. AND SUZANNE FONDREN, J. I. FORD, ABE FREY, HARRY FREY, J. A. FURR, JR., GEORGE W. GARDNER, VELMA B. GARNER, ELMER H. GAUTIER, H. W. GAUTIER, BARNEY GILES, MARLENE A. GILLICH, BARNEY GILLIS, L. A. GILLY, JR., CHARLES C. GOETZ, JR. AND LEE GARRETT GOETZ, GARY GOLLOTT, GROVER GRAHAM, JR., GLEN GRIFFING, CHARLES J. GUICE, SR., HANCOCK BANK, JOHN M. HARRINGTON, ELLISON HEBERT, B. G. (BARTLO) HUNT, A. E. HURD, A. E. HURD, ANTHONY J. INGRASSIA, JARDELL, INC., A MISSISSIPPI CORPORATION, JACK CHARLES JESSUP, J. CHARLES JESSUP, JEAN M. JOHNSON, BETTY JEAN JOHNSON, W. B. JONES, NAIF JORDAN, G. J. JUANICO, CHARLES B. AND MILDRED K. KLEPAC, ALVIN L. KLOTZ, CAREY W. KLOTZ, KULUZ BROTHERS PACKING COMPANY, KENNETH A. LADNER, DOROTHY S. AND VEEN LEE, JR., CELESTE F. LEGUENEC, FRED LEMON, HELEN GEORGE LEONARD, JAMES S. LOVE, JR., JIMMY LOVE, JR., R. C. LOWREY, VAL LUNDAY, GUS THEO MARODIS, GEORGE T. MARODIS, MELBEN OIL COMPANY, SIDNEY MILLER, GEORGE M. AND LILLIAN N. MITCHELL, J. C. MCBEATH, JAMES KENDRICK MCCARLEY, JIMMY L. AND AIMEE MCCLELLAN, JUDE T. AND MARTHA M. MCDONNELL, JOSSETA NIZETICH, JOHN B. OAKLAND, CITY OF OCEAN SPRINGS, MS., JERRY O'KEEFE, L. M. PAGE, WENDELL PALFREY, ANGE PARASKEVAS, JONNIE PARKINSON, CARL P. PETERSON, PETIT BOIS, INC., A LOUISIANA CORPORATION, MATEO P. PITALO, NICK AND LENORA PITALO, VICTOR B. PRINGLE, M. B. PUCKETT, LAZ QUAVE, DEWEY R. REAGAN, RED OAK LANDS, INC., A SOUTH CAROLINA CORPORATION, NORMA B. REED, C. J. RIVIERE, G. H. ROHR, BEVERLY C. ROMERO, JOHNNY ROMEO, ALLEN D. AND BETTY

ROOKE, ROY ROSALIS, THAD J. AND CAROL H. RYAN, JAMES REGINALD SANDERFORD, DONALD F. SANTA CRUZ, JR., THELMA J. SKRMETTI SCALFARO, WILLIAM FRANCK SCHENK, II, MIKE SEKUL, STEVE SHIRVERS, SILVER BEACH DEVELOPMENT COMPANY, GALE SINGLEY, ANTHONY J. AND MARGARET SKRMETTA, NOEL JAMES SKRMETTI SKRMETTA, PETER V. SKRMETTI SKRMETTA, SR., BRENDA K. SKRMETTI, JIMMIE SCRMETTI, GILDA R. SKRMETTI, PATRICK FRANCES SKRMETTI, PAUL M. SKRMETTI, MRS. PAUL M. SKRMETTI, PAUL M. SKRMETTI, JR., SKRMETTI REALTY COMPANY, THELMA P. SKRMETTI, THOMAS J. SKRMETTI, VIRGINIA E. SMITH, FRANCIS I. STANOVICH, J. D. STENNIS, JR., DR. RAY STEWART, RONNIE STRAHAN, SANTO STRANGI, JR., JUNE READ STRINGER, T. J. SWETMAN, MARY TILLINGHAST, E. L. TRENHOLM, F. A. TUCCI, JAMES E. UPSHAW, J. J. VIATOR, JR., FORDIE WALKER, MICHAEL J. WASHENKO, ARNOLD ARMAND WEILBACHER AND DORIS E. WILBACHER, ADRAIN WEILL, WALTER N. WENTZELL, HELEN B. WILKERSON WILKINSON, CARROLL E. WILLIAMS, JR., TRINITY WILLIAMS, THOMAS J. WILTZ, H. H. WOLFE, RICHARD L. YARBROUGH, STANFORD YOUNG, ALL UNKNOWN CLAIMANTS AND, IF DECEASED, THEN ALL HEIRS AND DEVISEES, THE STATE OF MISSISSIPPI ON BEHALF OF ITS CITIZENS

[Filed: Sept. 7, 1979]

COMPLAINT

Come now the plaintiff, United States of America, by Robert E. Hauberg, United States Attorney, at the request of the Secretary of the Interior of the United States, and alleges as follows:

1. This is a civil action brought by the United States in its sovereign and proprietary capacity, and the jurisdiction of this Court is invoked under 28 U.S.C. 1345.

2. The real property which is the subject of this action is located within the territorial jurisdiction of this Court.

3. Attached hereto is SCHEDULE A which is a listing of the defendants including corporations, business entities, and individuals who are adult resident citizens of the places as noted, and all whose addresses are listed can be served with process of this Court at the addresses noted; all others have unknown addresses.

4. The United States is the owner in fee simple of certain real property situated on Horn Island, Jackson County, Mississippi, situated about 13 miles southwest of the City of Pascagoula, described according to the public land surveys as follows:

(A) TOWNSHIP 9 SOUTH, RANGE 6 WEST, ST. STEPHENS MERIDIAN, all of fractional Sections 27, 28, 29, 30, 33 and 34; and in TOWNSHIP 9 SOUTH, RANGE 7 WEST, ST. STEPHENS MERIDIAN, in fractional Section 25, all of Lots 11, 12, 13, 14, 15 and 16.

Containing 1,215.78 acres more or less.

(B) TOWNSHIP 9 SOUTH, RANGE 7 WEST, ST. STEPHENS MERIDIAN, in fractional Section 22, all of Lots 11, 12, 13, 14, 15, 16, 17, 18 and all of fractional Sections 23, 26 and 27.

Containing 677.60 acres, more or less.

(C) TOWNSHIP 9 SOUTH, RANGE 7 WEST, ST. STEPHENS MERIDIAN, in fractional Section 18, all of Lot 5, and in fractional Section 19, all of Lots 8 and 9; and all accretions thereto, and in TOWNSHIP 9 SOUTH, RANGE 8 WEST, ST. STEPHENS MERIDIAN, all of fractional Sections 13, 23 and 24, and all accretions thereto.

Containing 525.51 acres, more or less.

5. The United States is the owner in fee simple of certain real property situated on Petit Bois Island in Mississippi Sound, Jackson County, State of Mississippi, described according to the public land surveys as follows:

TOWNSHIP 9 SOUTH, RANGE 4 WEST, ST. STEPHENS MERIDIAN, all of factional Section 31, all of fractional Section 32 and all accretions thereto.
TOWNSHIP 10 SOUTH, RANGE 4 WEST, ST. STEPHENS MERIDIAN, all of factional Section 6.

Containing 153.50 acres, more or less.

6. The United States is the owner in fee simple of certain real property situated on Ship Island, Harrison County, Mississippi, described as all that portion of Ship Island lying Northerly and Easterly of the Quarantine Station in projected Sections 20, 21, 22, 28 and 29, Township 9 South, Range 9 West of the St. Stephens Meridian in Harrison County, Mississippi more particularly bounded and described as follows:

Bounded on the Southeast by the Gulf of Mexico; bounded on the South and West by Quarantine Station and Grand Lagoon; bounded on the North by Mississippi Sound. The tract of land herein described includes all small islands adjacent to said tract.
Containing 242.24 acres, more or less.

7. Real property described in paragraphs 4, 5, and 6 above is designated on the plats filed simultaneously herewith which can be examined in this Court's Clerk office, Post Office Building, Biloxi, Mississippi.

8. The United States acquired the property described in paragraphs 4, 5 and 6 as part of the Louisiana Purchase in 1803. These lands were designated as part of the Gulf Islands National Seashore by the Act of January 8, 1971, 84 Stat. 1967 (1971).

9. The United States has never issued a patent on, nor has it otherwise conveyed, the real property described in paragraphs 4, 5 and 6 above, and title hereto remains in the United States.

10. The defendants and each of them claim or may claim a right, title or interest adverse to the United States to certain of the tracts of property owned by the United States described in paragraphs 4, 5 and 6, above, which are set forth in the 128 tracts contained in Schedule B attached hereto and made part hereof. Such claims are without any right whatsoever.

11. The above-mentioned claims constitute a cloud on the title of the United States to the above-described property.

WHEREFORE, the United States prays:

1. That the defendants, and each of them, be required to set forth their claims to the above-described property;

2. That all claims to the property be determined by this Court;

3. That it be declared that the plaintiff has been and now is the owner of the lands described in paragraphs 4, 5 and 6, above, and as further described in Schedule B to the complaint, and that title to said lands be quieted in the United States;

4. That it be declared that the possession of the defendants, and each of them, has been and now is without any right, title, or interest in and to the lands described in paragraphs 4, 5 and 6 of the complaint; that the defendants, and each of them, be permanently enjoined from entering upon or using said lands, and that defendants be required to remove all improvements, if any, from said lands and to restore said lands to the condition prior to their unlawful entrance thereon;

SCHEDULE A

CLAIMANTS NAMES AND ADDRESSES WHERE KNOWN

Adams, Andrew J., Jr. (Dr. P. O. Box 171 Gautier Mississippi	10-157
Allen, Jesse J.	10-185

Allen, Shelton P.	02-157 02-158
Anderson, Dewey (Dr.)	02-161
Baker, Arthur 206 Keller Avenue Biloxi, MS 39530	10-195 to 201
Baker, Ralph J. 207 Keller Avenue Biloxi, MS 39530	10-195 to 201
Bass, Raymond P. O. Box 1082 Biloxi, Mississippi	10-188
Beggerly, C. M., Estate of Route 9, Box 10 Jackson, Mississippi	02-130 to 132
Beggerly, Chris W.	02-130
Beggerly, Clark M., Jr.	02-130
Beggerly, James R.	02-130
Beggerly, J. R. P. O. Box 505 Axis, Alabama 36505	02-133
Beggerly, Norma A. Rt. 9 Box 10 Jackson, MS 39212	02-130

Bennett, Bernard J.	10-123
Bennett, Ora C. and Robert A.	10-114 10-116 10-118 10-123 10-131
Bertucci, Anthony J. and Grace B. 4615 Lewis Street Gulfport, Mississippi 39501	10-115
Bishop, Joe K.	10-144
Blackwell, T. G.	02-159 02-161
Blum, Jake	10-192
Bosorge, Clyde	04-106
Bostwick, G. F.	10-143
Bowdish, Gordon S.	10-171 to 194 10-204 to 206
Breland, Dan E. 1341 Northside Drive Jackson, Mississippi 39211	10-131
Brou, Margaret M. 325 Jackson Avenue Ocean Springs, Mississippi 39564	10-145 10-156
Brown, H.G.	02-161

Bray, Gilles G. and Gerda L.	10-199
Buffington, Carlos	02-158

5. That the defendants be permanently enjoined from asserting any adverse claims to the property;

6. For an order granting the United States possession of the property;

7. That plaintiff be granted all further and general relief as the Court may deem just and proper in the premises; and

8. That plaintiff be awarded its costs expended herein.

9. And for all further relief as may be just and proper.

ROBERT E. HAUBERG
United States Attorney
Post Office Box 2091
Jackson, Mississippi 39205

By:
/s/ L. K. TRAVIS
L. K. TRAVIS
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. S79-0338(R)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDREW J. ADAMS, JR., ET AL., DEFENDANTS

[Filed: December 30, 1982]

ORDER FOR DISTRIBUTION OF FUNDS

It appearing in the above styled cause, the hereinafter named Defendants appearing by and through their attorneys have agreed upon a settlement and disposition of the interests involved and whereby the Government has agreed upon the payment of the sum and amount of $400,000.00 into the registry of the Court for settlement and disposition as to the interests involved; and

WHEREAS, the parties in interest represented by counsel are the following, to-wit:

1. Arthur Baker, Ralph Baker, Walter N. Wentzell, L. M. Page and Francis Stanovich, represented by Lyle M. Page, Attorney.

2. David A. Doherty, Adelaide H. Doherty, Mrs. A. E. Hurd, Sr., Mrs. Anne H. Bradley, Mrs. Jane H. Sims, Mrs. Irene H. Hawley, Alfred E. Hurd, Jr., Louis W. Hurd, Mrs. Linda H. Smith and Mrs.

Faye H. McCarey, represented by Wynn E. Clark, Attorney.

3. W. B. Jones, representing himself.

4. First National Bank of Jackson, Trustee of Paul Chambers Mineral Trust, J. S. Love, Jr., M. B. Puckett and Petit Bois, Inc., represented by James L. Martin, Attorney.

5. State of Mississippi, represented by Mack Cameron, Assistant Attorney General.

6. E. J. Delcambre, Ronnie Strahan and Ellison Hebert, represented by C. W. Ford, Attorney.

7. Fred Lemon, represented by Russell Thompson, Attorney.

8. Lou Ann Gilly, Frances Wade Gilly and Ola Pitalo, represented by Jacob D. Guice, Attorney.

9. Jimmy and Aimee McClellan, Heirs of Carroll E. Williams and Allen D. Rooke and Betty Rooke, represented by George Morse, Attorney.

10. Marlene Gillich and Frank Schenck, represented by Keith Pisarich, Attorney.

11. Raymond Bass, Bartlo Hunt, Anthony J. Bertucci, Grace Bertucci and Noel J. Skrmetti, represented by Robert A. Acevedo, Attorney.

12. Cornelia Reagan Berry, Johnny & Beverly Romeo, Grover Graham, Jr., Thomas J. Wiltz, Margaret Brou, Johnnie Parkinson, Cosman Eisendrath, Dr. Clay Easterly, Mr. & Mrs. Donald Santa Cruz, Jerry & Shannon Covich, Mrs. Bobbye Pringle, Laz Quave, Mrs. Helen Leonard, A. W. Covacevich, Naif Jordan, Caroline Bell (Leader), Louis Fondren,

Genevieve Curtis and Wakeman B. Curtis, represented by Thomas J. Wiltz, Attorney.

13. Dan E. Breland, represented by R. L. Netterville, Attorney.

And it further appearing that by agreement of the parties through counsel of record, that as to the foregoing Defendants involved, that of the $400,000.00 proceeds deposited into the registry of the Court in the cause, the sum of $191,824.13 is to be distributed to the following individuals and/or their attorneys with the amounts being received by hereinafter named counsel, to be received for and on behalf of their respective clients and so that the Clerk is hereby authorized, directed and ordered to issue checks in distribution of the said sum of $191,824.13 as follows, to-wit:

James L. Martin, Attorney P. O. Box 15 Jackson, Mississippi 39205	$ 36,165.79
C. W. Ford, Attorney P. O. Box 100 Pascagoula, Mississippi 39567	3,367.94
W. B. Jones, Attorney P. O. Box 100 Pascagoula, Mississippi 39567	1,786.47
Lyle M. Page, Attorney P.O. Drawer 289 Biloxi, Mississippi 39533	50,152.98
Wynn E. Clark, Attorney P. O. Box 1673 Pascagoula, Mississippi 39567	31,922.19

Thomas J. Wiltz, Attorney P. O. Box 302 Biloxi, Mississippi 39533	25,285.89
R. L. Netterville, Attorney P. O. Box 946 Natchez, Mississippi 39120	2,928.64
Keith Pisarich, Attorney P. O. Box 936 Biloxi, Mississippi 39533	4,685.82
George Morse, Attorney P. O. Drawer 100 Gulfport, Mississippi 39501	4,442.75
Jacob D. Guice, Attorney P. O. Box 153 Biloxi, Mississippi 39533	4,240.67
Russell Thompson, Attorney P. O. Box 552 Ocean Springs, Mississippi 39564	1,765.97
Robert Acevedo, Attorney P. O. Box 136 Biloxi, Mississippi 39533	1,478.97
State of Mississippi c/o Mack Cameron Assistant Attorney General P. O. Box 220 Jackson, Mississippi 39205	1,014.32
Louis Fondren, Attorney 1205 Beach Boulevard Pascagoula, Mississippi 39567	585.73

James L. Martin, Attorney
P. O. Box 15
Jackson, Mississippi 39205 9,142.86

Genevieve Curtis
c/o Thomas J. Wiltz, Attorney
P. O. Box 302
Biloxi, Mississippi 39533 1,000.00

Wakeman B. Curtis
c/o Thomas J. Wiltz, Attorney
P. O. Box 302
Biloxi, Mississippi 39533 11,857.14

TOTAL $ 191,824.13

And it further appearing that the Defendants, James R. Beggerly and Chris W. Beggerly have settled with the Plaintiff as to their interest for the balance of funds involved in said $400,000.00 figure and whereby, said Defendant, James R. Beggerly, and Chris W. Beggerly by and through their attorney, James L. Martin, are to receive the sum and amount of $208,175.87, with said amount to be paid to their Attorney, James L. Martin.

And it appearing that an Order should now be entered providing for the distribution of the funds deposited in the registry of the Court. The Clerk of the Court is now ordered, authorized and directed to disburse said funds totaling $191,824.13 to the persons and attorneys above named and as directed, and with the checks to be mailed to the addresses given for each and as to the balance of the funds accruing to the Defendant, James R. Beggerly and Chris W. Beggerly, check therefore, in the sum and amount of Two hundred eight thousand, One Hundred seventy-

five & 87/100 ($208,175.87) shall be issued by the Clerk to James L. Martin, Attorney for said Defendants, James R. Beggerly and Chris W. Beggerly, at P. O. Box 15, Jackson, Mississippi, 39205.

ORDERED and ADJUDGED this the 30th day of December, 1982.

/s/ JOHN M. ROPER
UNITED STATES MAGISTRATE

The Above Order Approved for
Entry:

/s/ LYLE M. PAGE
LYLE M. PAGE, Counsel for Defendants
Arthur Baker, Ralph Baker, Walter N.
Wentzel, L. M. Page and Francis
Stanovich

/s/ WYNN E. CLARK
WYNN E. CLARK, Counsel for Defendants
David A. Doherty, Adelaide H. Doherty,
Mrs. A. E. Hurd, Sr., Mrs. Anne H.
Bradley, Mrs. Jane H. Sims, Mrs. Irene H.
Hawley, Alfred E. Hurd, Jr., Louis W.
Hurd, Mrs. Linda H. Smith and Mrs. Faye H.
McCarey

/s/ W. B. JONES
W. B. JONES, Pro Se

/s/ JAMES L. MARTIN
JAMES L. MARTIN, Counsel for
Defendants First National Bank
of Jackson, Trustee of Paul
Chambers Mineral Trust,
J. S. Love, Jr., M. B. Puckett
and Petit Bois, Inc. and James R.
Beggerly and Chris W. Beggerly

/s/ MACK CAMERON
MACK CAMERON, Counsel for Defendant
State of Mississippi

/s/ C. W. FORD
C. W. FORD, Counsel for Defendants
E. J. Delcambre, Ronnie Strahan
and Ellison Hebert

/s/ RUSSELL THOMPSON
RUSSELL THOMPSON, Counsel for
Defendant Fred Lemon

/s/ JACOB D. GUICE
JACOB D. GUICE, Counsel for Defendants
Lou Ann Gilly, Frances Wade Gilly and
Ola Pitalo

/s/ GEORGE MORSE
GEORGE MORSE, Counsel for Defendants
McClellan, Heirs of Carroll E. Williams
and Rooke

/s/ KEITH PISARICH
KEITH PISARICH, Counsel for Defendants
Marlene Gillich and Frank Schenck

/s/ ROBERT M. ACEVEDO
ROBERT M. ACEVEDO, Counsel for Defendants
Raymond Bass, Bartlo Hunt, Anthony J. Bertucci,
Grace Bertucci and Noel J. Skrmetti

/s/ THOMAS J. WILTZ
THOMAS J. WILTZ, Counsel for Defendants
Cornelia Reagan Berry, Johnny & Beverly
Romeo, Grover Graham, Jr., Thomas J.
Wiltz, Margaret Brou, Johnnie Parkinson,
Cosman Eisendrath, Dr. Clay Easterly,
Mr. & Mrs. Donald Santa Cruz, Jerry &
Shannon Covich, Mrs. Bobbye Pringle,
Laz Quave, Mrs. Helen Leonard, A. W.
Covacevich, Naif Jordan, Caroline Bell
(Leader), Louis Fondren, Genevieve
Curtis and Wakeman B. Curtis

/s/ R. L. NETTERVILLE
R. L. NETTERVILLE, Counsel for
Dan E. Breland

Approved as to form:

/s/ JERRY A. DAVIS
JERRY A. DAVIS
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. 1:94cv264RR

CHRIS W. BEGGERLY, ET AL., PLAINTIFFS

V.

UNITED STATES OF AMERICA, DEFENDANT

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, Chris W. Beggerly, James R. Beggerly, Clark M. Beggerly, Jr., Velma B. Garner, Suzanne Reed and David Reed ("Beggerlys"), move the Court to grant summary judgment pursuant to F.R.C.P. 56(c). In support of their motion, the Beggerlys state the following:

1. This action was commenced on June 1, 1994 when the Beggerlys filed their Complaint and requested that the Court set aside the judgment and the underlying settlement in *United States of America v. Adams, et al.*, Civil Action No. S79-0338(R) (S.D. Miss. 1982) ("*Adams*") and award them damages equal to the fair market value of their property.

2. In the Complaint, the Beggerlys assert ownership of certain property on Horn Island, Jackson County, Mississippi. The property as described in Paragraph 6 of the Complaint was purchased by Clark

M. Beggerly, Sr. at a tax sale in 1950 in Jackson County, Mississippi.

3. In order to prevail, the Beggerlys must prove a valid grant or patent of Horn Island out of the sovereign.

4. The Beggerlys, by expert Affidavit of Dr. Hans Baade, show the following:

a. In 1781, a grant of Horn Island was made by Bernardo de Galvez, Governor General of Spanish Louisiana, to Catarina Boudreau ("Boudreau Grant").

b. The Boudreau Grant is a valid, binding and final grant of Horn Island under Spanish law when made and its validity was subsequently confirmed by treaty between the United States and Spain.

c. The United States by treaty recognized all private grants which were made prior to 1818 and which were valid and binding according to the Spanish law.

5. Accordingly, there is no genuine issue of material fact as to the validity of the Boudreau Grant and the Beggerlys are entitled to summary judgment as to their title.

WHEREFORE, PREMISES CONSIDERED, the Beggerlys respectfully request the Court to enter summary judgment ruling that as of December 3, 1982, the Beggerlys had valid title of their property as described in Paragraph 8 of the Complaint and that the Stipulation and Settlement and the Judgment and Order dated December 3, 1982 are void and of no effect as to the Beggerlys' interest and should be set aside.

This the 15th day of March, 1995.

Respectfully submitted,

CHRIS W. BEGGERLY, JAMES R. BEGGERLY, CLARK M. BEGGERLY, JR., VELMA B. GARNER, SUZANNE REED AND DAVID REED

By Their Attorneys
WATKINS LUDLAM & STENNIS

By: /s/ ERNEST G. TAYLOR, JR.
ERNEST G. TAYLOR, JR.

Ernest G. Taylor, Jr. (MB #7451)
Jim B. Tohill (MB #8234)
Robert E. Hauberg, Jr. (M#8958)
Robert M. Arentson, Jr. (MB #1612)
WATKINS LUDLAM & STENNIS
633 North State Street
P. O. Box 427
Jackson, MS 39205-0427
(601) 949-4900

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. 1:94cv264RR

CHRIS W. BEGGERLY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT OF CHRIS BEGGERLY

STATE OF MISSISSIPPI
COUNTY OF HINDS

Personally appeared before me, the undersigned authority in and for the aforesaid jurisdiction, Chris Beggerly, who stated on his oath the following:

1. My name is Chris Beggerly. I am an adult resident citizen of Florence, Mississippi and am competent to testify. I have personal knowledge of the facts set forth in this affidavit.

2. I grew up in Rankin County, Mississippi. I left Mississippi to join the Navy in 1944, when I was 18 years old. (I followed my brother Raleigh who had joined the Navy in 1942.) After three years of continuous overseas service in the South Pacific, I returned in 1946.

3. On April 3, 1950, certain properties in Jackson County, Mississippi, were placed on sale at the Jackson County Courthouse in Pascagoula, Mississippi, for delinquent taxes.

4. My daddy, Clark M. Beggerly, Sr., who was interested in making a long-term investment for the benefit of our family, attended the Jackson County tax sale and purchased approximately 626 acres on Horn Island, Jackson County, Mississippi, in the name of his son (my brother), James R. Beggerly. This acreage is described as Lots 1, 2, 3 and 4, Section 27, Township 9 South, Range 6 West; Lots 1, 2, 3 and 4, Section 28, Township 9 South, Range 6 West and Lots 1, 2, 3 and 4, Section 29, Township 9 South, Range 6 West. Also, daddy and A. E. Hurd purchased approximately 225 acres described as Lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, Section 30, Township 9 South, Range 6 West.

5. On July 18, 1960, A. E. Hurd and daddy divided their jointly owned property. Daddy conveyed Lots 5, 6, 7, 8 and 9 to A. E. Hurd and A. E. Hurd conveyed Lots 1 through 4 and Lot 10 to daddy. They drew straws to determine who would get which Lots. In 1961, daddy died leaving his interest in his lots to my mama, Norma A. Beggerly. On March 24, 1971, mama conveyed these same lots to her children Clark M. Beggerly, Jr., James R. Beggerly (Raleigh), Norma B. Reed, Velma B. Garner and me. Subsequently, Norma Reed died leaving her interests to her children, Suzanne and David.

6. If the government had not taken our property, the current interest of each member of the family in the Horn Island property would be as follows:

a. James R. Beggerly owns a 100% interest in Lots 1, 2, 3 and 4, Section 27, Township 9 South, Range 6 West; Lots 1, 2, 3, and 4, Section 28, Township 9 South, Range 6 West; and Lots 1, 2, 3, and 4, Section 29, Township 9 South, Range 6 West. He also owns an undivided one-fifth interest in Lots 1, 2, 3, 4 and 10 of Section 30, Township 9 South, Range 6 West.

b. Chris W. Beggerly owns an undivided one-fifth interest in Lots 1, 2, 3, 4 and 10 of Section 30, Township 9 South, Range 6 West.

c. Clark M. Beggerly, Jr. owns an undivided one-fifth interest in Lots 1, 2, 3, 4, and 10 of Section 30, Township 9 South, Range 6 West.

d. Velma B. Garner owns an undivided one-fifth interest in Lots 1, 2, 3, 4, and 10 of Section 30, Township 9 South, Range 6 West.

e. Suzanne Reed owns an undivided one-tenth interest in Lots 1, 2, 3, 4 and 10 of Section 30, Township 9 South, Range 6 West.

f. David Reed owns an undivided one-tenth interest in Lots 1, 2, 3, 4 and 10 of Section 30, Township 9 South, Range 6 West.

7. I had nothing to do with the purchase of that property, but after my daddy died in 1961, I got involved with the management of the part that my mama owned. Later on, I started working with Raleigh closely to help him deal with his problems with his property too. In the Navy they called him Jim and he has continued to be called Jim since, but I grew up

calling him Raleigh and still do. Raleigh and I have always been close. As boys we fought with each other all the time, but we always fought together against anybody else and still do. Raleigh is the cautious scholar. He managed to continue his education and become an engineer. I never got beyond a high school. Raleigh is careful and thorough. I am hot-headed and sometimes go off half cocked. We are very different, but when the chips are down, we pull together. Therefore, when this thing got to be a tough go, and Raleigh couldn't take the pressure any longer, he asked me to get involved and get out front to help him. I was glad to do it.

8. As I was saying, after my daddy died, I started looking after the family interest and finally, my mama gave a deed to each of the children dividing it up among us. My brothers and sisters agreed that I ought to manage their interests and eventually Raleigh and I just worked together on this without worrying about ownership.

9. After the Congress adopted the Gulf Island National Seashore law to create the park, Mr. Creighton contacted Raleigh and me and told us that they were going to arrange for a boat trip to go out to the island and they wanted to take us to our property along with Mr. Ed. Turner, the government's land appraiser, and other owners. We accepted the offer and when we got out to the island, Mr. Turner, showed us where a marker was on the East end of our property and said that was where our property began. He told us that they would let us off there and come back and pick us up at the end of the day about four miles west of that point where we would find another post on the west end of our property. We spent the

day on the island walking from east to west. At the appointed time, the government boat showed up at the west end where we had located our marker and we got back on the boat and returned to the mainland. I enjoyed talking to the boat captain who told us about the Waters family who had lived on the Island for several generations and built houses on the Island. He told us about folks bringing sweet milk in from the island to sell.

10. Sometime after that, Mr. Creighton got in touch with us and offered to buy the property. He talked to me about the property we bought in my daddy's name and talked to Raleigh about the property that was in Raleigh's name, but he made the same offer to both of us and we were both treated about the same. I remember that I asked Mr. Creighton to give me a copy of the government's appraisals for the land and the minerals so that I could look it over and make my own judgment on whether the values were right or hire my own appraiser and have him look at them. Mr. Creighton assured me that they had appraisals for both the land and the minerals, but he refused to give me a copy of them. This became a sticking point with us and I kept demanding but never succeeded in getting a copy of the appraisals. At some point I made a counter-offer of $2,000 per acre, but he showed no interest in negotiating. After several meetings and telephone calls back and forth, our talks finally broke down and I didn't hear any more from Mr. Creighton.

11. I am attaching as Exhibit "A" the map which Creighton gave me during our first meeting. This map was used as the reference map throughout our negotiations and when the lawsuit was filed. Raleigh's parcel 02-133 is 626 acres, not 438.98 acres

as shown on the map. Throughout negotiations with Creighton and the other government representatives 626 acres has been acknowledged as correct.

12. A little bit later on, a Mr. Kippes got in touch with me and he made similar offers. Mr. Kippes' deal wasn't any better than Mr. Creighton's deal, so we didn't get anywhere. I continued to insist on getting to see their appraisal and also asked if I could have an appraiser hired by me go to the island with their appraiser. They refused to accept that proposal. They were adamant that they had done an appraisal and that nothing else needed to be done and that they were going to pay me their price and that was that.

13. Finally, a third guy got in touch with us, a Mr. Burton Winkle, who told us that they were having a big ribbon cutting concerning the park and that they wanted to get at much property purchased as they could before the ribbon cutting which would be attended by the Secretary of the Interior. We agreed to meet with him at a restaurant on the coast where Highway 49 meets Highway 90 and spent three or four hours in a meeting with Mr. Winkle talking about the park property and the background and various details concerning the title. We had employed counsel to assist us with resolving questions about the patents. As I recall, one of the problems the lawyers had is that since the courthouse had burned down in Pascagoula, all of the old original records were gone and there were some question about these patents which we had gotten that were issued to Indians.

14. At any rate, after three or four hours of talking and going back and forth, a deal was reached for them to buy Raleigh's part of the property for, I believe,

$157,500. Raleigh signed a contract to sell and I witnessed it. Mr. Winkle wrote out a check while we were there and told us that as soon as it cleared his acquisition account, we would get our money. The check and the deal related only to Raleigh's property and not to the other family property. Mr. Winkle was primarily interested in buying the bigger pieces of property and having that closed out in time for their ribbon cutting ceremony. Before going to this meeting I had talked with Raleigh about holding out, but he was under a lot of pressure and had decided that he needed to get rid of this problem and not have to face the on-going bother that was caused by dealing with the government with this land. As I said all along, we have always worked together and once I realized that's what was best for him, then that suited me. It doesn't matter anyway since the government broke the contract and refused to deliver his check.

15. Going back to the time period after we took our boat ride and first met with the government folks, about that time, I started getting calls at my office in Jackson from various people who were asking my permission to use our land for recreational purposes, fishing and what have you. They knew where it was and that we owned it. Apparently, once the new park was created, the government began patrolling the island and running people off. Many of these people had fished and gathered shrimp and oysters on and around the island for several generations and they were very upset that the government was running them off. I gave a number of people written permits saying that could use our property. I had several folks tell me that the guards would accept a written note from me giving them permission to be on the

land. I made a point of telling people that they were welcome to go out there as long as they left it cleaned up and didn't cause any trouble. I remember having one man tell me that he liked to catch shrimp near our property and that if I would come down on Thursday when he had his day off, he would give me a sack of shrimp. Other people called back to thank me and I don't know how many people I talked to but there was a substantial number of folks who called me over a period of several years after the park was first created.

16. Sometime in 1979, Federal Marshall Benny Crumpton came into my office and served the papers on me, saying that the United States government was suing us to quiet title. I knew Benny since we parked company cars in the same parking lot the government used. He always teased me about wanting to serve papers on me someday, but neither one of us expected that he would ever get to do it.

17. At that time, I was extremely busy at my work. I was transportation superintendent for Mississippi Power & Light Company supervising the operation of over 700 vehicles; one of them was broke down, turned over, on fire or stole any hour of the day. I simply did not have time to fight a lawsuit. Therefore, I got in touch with a Mr. Tobin, whose name I had gotten from some source. I understood that he was one of the top people in the Department of Interior and that he had authority to work out a settlement. As it turned out, I had a conference in the D.C. area that I needed to attend and we set up a time to meet that tied in with my conference dates. When I got to Washington and concluded my other meeting, I went to Congressman Cochran's office and he had someone take me to Mr.

Tobin's office. When I got there, I found out that Mr. Tobin was not present; he was refereeing a tennis match that afternoon. However, the receptionist assured me that there were other people set up to meet with me and that they could take care of my business. We then sat down and met with three or four other people from that office who, as it turned out, knew absolutely nothing about my business. I left this meeting very upset and frustrated, feeling that I had totally wasted my time and had accomplished absolutely nothing.

18. Somewhere along in here, I heard about John Stocks and his interest in Petit Bois. I got in touch with him and he set up a meeting with his lawyer, Jim Martin, and we ended up hiring Jim Martin to represent us. Jim worked with Raleigh on doing research to locate patents and grants. As we got close to trial I thought we had a good case, but Martin told us that we would not be able to win because we could not prove that we had good patents. The government came up with some money and everbody decided to settle. I didn't want any part of it, but finally had to agree when my lawyer told me I had no choice.

19. Before we left the courthouse Steve Herman, the government's lead attorney asked me to sign something. I told him I would sign his document if he would give me a letter saying that the settlement money we would get was not for the purchase of our land. He said he would do that since the government did not believe that we owned any land. Several months later I received the letter attached as Exhibit "B".

20. After the settlement, we went home disgusted with the whole affair. I knew the sensible thing to do

was to just walk away from it and I tried to do that but just couldn't. There was just too much evidence of private ownership and use on that island. I had to keep looking. So I started making phone calls and writing letters to anyone and everyone who I thought might help me. I also learned about Freedom of Information Act requests and started using them.

21. Along the way I wrote letters to Presidents Carter, Reagan and Bush; Secretaries of the Interior, Andrus Watts and Lujon and many other federal and state officials and employees. From time to time someone would try to be helpful, but most of the time they told me that since I didn't have a patent, there was nothing they could do. I got a huge stack of papers from the FOIA requests which helped answer some questions, but for the most part I was going in circles.

22. Finally, someone told me that I needed to hire a genealogist to do research at the National Archives in Washington, D.C. I got in touch with the genealogical society headquarters and they sent me a book. I had the good fortune of selecting Mrs. Edith Axelson from the list of names in the Washington, D.C. area and asked her if she would be willing to do research for us. She said that she would and seemed interested.

23. She told me that she had started doing genealogical work late in life and loved her work. I believe she was over seventy years old then. I put her in touch with Raleigh since he had had so much experience doing research at the various archives. He followed up with giving Mrs. Axelson directions on what we were interested in and after several weeks of work she produced the grant we had been looking

for, the grant from Governor Galvez to Catarina Boudreau.

24. After receiving the Boudreau grant, I took it to Dr. Patricia Galloway at the Mississippi State Archives. I had gotten to know Dr. Galloway, since she had testified, or given a deposition in the court proceedings, concerning the absence of a grant on Horn Island. I had talked with her when I did research in the state archives and knew that she had expertise in these old grants. When I showed her the grant, she said that it looked like it was a good grant, but that she was not an expert on the Spanish grants.

25. I sent the grant to the Bureau of Land Management and told them that since we now finally had a grant of Horn Island, I wanted them to issue my patents on the land. After some wait, they sent me a letter, a copy of which is attached as Exhibit "C". As is clearly stated in the letter, they told me that my grant didn't make any difference, and that they had thoroughly researched the matter and there was no need to take it any further. Ultimately, they told me that if I didn't like it, I could file a lawsuit.

26. At this point, I started looking for legal counsel and ended up hiring our present legal counsel who then guided us toward finding an expert who could determine whether or not the grant was valid and what its legal effect was. I assisted in this effort by making various contacts and phone calls looking for a qualified expert and after talking with several different knowledgeable people in New Orleans and other locations, we were assured that the best expert in the field was Dr. Hans Baade at the University of Texas. Our counsel got an introduction to him and

made contact. He was very interested in our case and assured us that he was able to do a complete analysis of the grant. We hired him and have now received his opinion which states that the grant is a valid grant.

27. After getting Dr. Baade's opinion and having the opportunity to talk with him in person, we began making plans to file a lawsuit and, ultimately, we filed this suit.

28. I am now retired, but during most of this time period I was working hard, around the clock at times, and fighting this battle in my few spare moments has been tough. I have never objected to selling my land. I know the government has the right to condemn it and take it for a park. All I want is to have a fair hearing on my title and be paid a fair price for my land.

This, the 14th day of March, 1995.

Respectfully submitted,

/s/ CHRIS W. BEGGERLY
CHRIS W. BEGGERLY

Sworn to and subscribed before me on this, the 14th day of March, 1995.

/s/ GWEN B. ALLEN
Notary Public

My Commission Expires:

My Commission Expires July 16, 1995

[DOJ Seal Omitted] U.S. Department of Justice

MEF:DFS
90-1-5-1867

Washington, D.C. 20530

March 21, 1983

Mr. C.W. Beggerly
Route # 3
Box 235A
Florence, Mississippi 39073

Dear Mr. Beggerly:

Re: United States v. Dr. Andrew J. Adams, et al.,
Civil No. 79-0302, USDC, S.D. Miss.

This letter is in response to your request for clarification of the settlement agreement in the above-referenced case. The position of the United States throughout the litigation, as evidenced by the pleadings and motions submitted to the Court, was that title to the disputed property remained in the United States.

The settlement agreement was filed with the Court and is a matter of public record. Our interest in the settlement of the case was to avoid what promised to be a long and costly litigation, and in no way is an acknowledgement by the United States that your

title was valid. The agreement does not purport to convey land, as you could not sell what you did not own.

I hope I have been of assistance.

Sincerely,

Assistant Attorney General
Land and Natural Resources Division

By: /s/ STEVEN A. HERMAN
STEVEN A. HERMAN
Attorney

UNITED STATES DEPARTMENT OF THE INTERIOR

[seal omitted] [graphic omitted]

BUREAU OF LAND MANAGEMENT
Eastern States
7450 Boston Boulevard
Springfield, Virginia 22153

IN REPLY REFER TO:
2000(020)SLF

NOV 20 1992

Mr. Chris W. Beggerly
200 Beggerly Place
Florence, Mississippi 39073

Dear Mr. Beggerly:

This is in response to your letter of July 14, 1992, and telephone conversations with the Bureau of Land Management (BLM) personnel and the Solicitor's Office. We apologize for the length of time it has taken us to respond, but we wanted to ensure that we researched all available information so we could adequately respond to your concerns.

In your letter you state that you are applying for patents covering land in Jackson County, Mississippi. You specifically request "Patents covering all of Horn Island in which [you] have a vested interest." Please be advised that BLM is required to follow

the statutes passed by Congress and the appropriate regulations published in the Code of Federal Regulations (CFR). Furthermore, all of Horn Island is currently within the Gulf Islands National Seashore, and is therefore under the jurisdiction of the National Park Service (NPS) and not the BLM.

After thoroughly researching your contentions, we find that you do not a have valid claim to land described as Lots 1, 2, 3, and 4, Section 27, Lots 1, 2, 3, and 4, Section 28, Lots 1, 2, 3, and 4, Section 29, Lots 1 through 10, Section 30, all in T. 9 S., R. 6 W., St. Stephens Meridian, Jackson County, Mississippi on Horn Island and, therefore, are not entitled to ar patents to land on Horn Island. The reasons for our decision are:

1. <u>The land has never been patented out of Federal ownership.</u>

First and foremost, Horn Island came into the United States (U.S.) in 1803 as part of the Louisiana Purchase. In 1800, Spain ceded to France all of its Louisiana Territory under the treaty of San Ildefonso. This land was then ceded to the U.S. by France in 1803 and is now known as the Louisiana Purchase. The Louisiana Purchase included all land south of 31 degrees north latitude, with an eastern boundary at the Perdido River—now the boundary between the panhandles of the States of Florida and Alabama—and a western boundary running diagonally northwest through what is now the State of Louisiana. Viewing a map confirms that all Mississippi barrier islands, Horn Island included, were part of the Louisiana Purchase.

We have not found any patents to any private parties or municipalities in our current research, nor were any such patents found during the exhaustive research performed in preparation for and during the litigation initiated in 1979. This fact forced the National Park Service (NPS) to cancel its offer to purchase land ostensibly belonging to you. After nearly consummating a deal with you, the NPS found from its title company that the land in question had never been patented out of Federal ownership. The land, therefore, belonged to the U.S. and the NPS had to back out of the deal. As for the authority of the NPS negotiators, they were authorized to purchase land for the NPS, but only if the seller had good title. In this case, you could not convey good title, therefore the negotiators technically were not authorized to enter a deal with you.

As the patents you claim were issued incorrectly, these are legitimate and legal patents issued to the named individuals for land in the Chickasaw Meridian. These lands were subject to sale at the land office in Pontotoc, Mississippi. The patents you are claiming as having been issued for land on Horn Island are valid patents for land in northeastern Mississippi. A thorough search of the tractbooks at our office in Springfield, Virginia, verifies this. The three patents to the three named Indians are recorded in the tractbooks located in Springfield. These tractbooks also show that no patents were ever issued for the lands you claim on Horn Island. Because no patents were issued, the land was still in Federal ownership at the time you thought you were purchasing it and it is still in Federal ownership today.

You have also pointed out the seeming inconsistency of the government's position to condemn Horn Island in 1943. You argue that there would be no need to condemn Horn Island if the government already owned it. However, the government does not waive any of its rights by filing a condemnation action; the initiation of a condemnation action constitutes neither the admission of any rights in others nor the waiver of any rights in the government. In this case, due to the exigencies of World War II, the Federal Government needed the land immediately and the quickest way to obtain it was to petition for condemnation. Condemnation allowed the U.S. to gain immediate possessory interest in the land without engaging in time-consuming purchase negotiations or litigation to determine what interests, if any, were held by individuals residing on the land.

2. The 1982 judgment and settlement agreement quieted title in the U.S. and disposed of your claim.

Even if there had been a question as to whether Horn Island had ever been patented out of Federal ownership, the question of ownership was finally resolved by the 1982 judgment in the quiet title action. Because of the uncertainties surrounding your title and that of other affected "landowners," the U.S. brought a quiet title suit in 1979. You were a named defendant in that suit. The suit was not brought in an adversarial spirit, but rather to try to clear up the uncertainties and to finalize ownership in the rightful parties. The case was settled and title to all of Horn Island was quieted in the U.S. You agreed

to the settlement and received a goodly sum of money to compensate you for your claimed interest in the land.

The 1979 litigation was the perfect forum in which you could have presented your evidence of ownership. Extensive research had been done by the government and presumably by your attorney, and through the discovery process each side was aware of the other's arguments and evidence and an unbiased decision maker would have made the final decision. However, instead of pursuing this opportunity, you chose to settle the case and accept money in lieu of title. The court's judgment and the settlement agreement between you and the government terminated any interest you may have had in the land on Horn Island and conclusively ends the question of its ownership. As part of the court's judgment it was "Further ordered that all defendants and their heirs are permanently enjoined from asserting any adverse claims to the subject property described in the Complaint. . . ." This judgment is legally binding on all parties.

3. The Spanish land grant was not properly confirmed.

Although the 1982 judgment disposes of your claim to land on Horn Island, you state you have a Spanish land grant which was not considered during the litigation and which changes the posture of the case. We are aware that there is a 1781 Spanish grant of Horn Island to one Catharine Beaudreaux (with various spellings). We are also aware that the 1819 treaty between Spain and the U.S. states that all such grants made prior to January 24, 1818, would be

"ratified and confirmed to the persons in possession." However, Mrs. Beaudreaux's claim was never properly confirmed. As the U.S. spread westward acquiring various lands, land commissions were established throughout each new territory. The purpose of these commissions was to aid the citizens in filing their land grants for confirmation from Congress. If a claimant presented sufficient evidence of a claim to the proper commission, the commission would recommend confirmation and in most instances Congress would confirm the claim. Without this confirmation, the BLM is unable to recognize any private land claims or land grants in the present day and age.

We have searched all known sources for information on confirmation of Mrs. Beaudreaux's grant and have found nothing. The only confirmation of any private land grants for a family named Beaudreaux (spelled Budreux) was in the State of Alabama. Since Mrs. Beaudreaux never received confirmation of her claim, title to her land remains vested in the U.S.

4. <u>At the time of the court settlement, your claim had been diminished.</u>

It appears that by the time your claim to the land reached the court, some of your claim had been transferred to Mr. A. E. Hurd. On July 18, 1960, Clark M. Beggerly transferred by Quitclaim Deed Lots 5-9 of Section 30 to Mr. Hurd. As to your own personal claim to these lands, you, Mr. Beggerly, did not have a claim until your mother conveyed to her children Lots 1-4 and 10 of Section 30 in February 1971. Therefore, we believe that you were fairly compensated by your 1982 settlement for $208,175.87,

which was $52,175.87 more than the NPS offer which you were wiling to accept.

5. <u>Chronology of Federal surveys</u>

There is an extensive history of Federal surveying activity on Horn Island which further substantiates a continuing Federal ownership. Additionally, by the time of the quiet title action brought by the Federal government, Horn Island had shifted through erosion and accretion. This is documented through surveys done by the BLM Cadastral Survey Division since 1824.

The earliest locatable survey of Horn Island was done by Deputy Surveyor Elihu Carver in 1824. Mr. Carver initially traversed the exterior limits of Horn Island in its entirety. The survey done by Mr. Carver did not divide the island into sections.

In 1846, Deputy Surveyor Henry Hamblin surveyed the island and subdivided the island into fractional sections. No lots or tracts were used at this time. The first survey to include lots within each section was the supplemental plat of 1907 survey. At this time, Sections 27, 28, and 29 were each further subdivided to include Lots 1, 2, 3, and 4 in each section; while Section 30 was subdivided to include Lots 1-10.

In 1928, Wesson Cook, U.S. Transitman, conducted a dependent resurvey of Horn Island in T. 9 S., R. 5, 6, and 7 West. At the time of this survey, a certain amount of accretion had taken place on the northern and western margins of the island, while the southern margin had eroded. Because of this fact, those sec-

tions remaining in Federal ownership were each reallotted to accurately reflect the changes in area. The areas of those lots affected by erosion were shown in two parts, "A" denoting land areas, and "B" denoting water areas, and were computed proportionally according to the total areas of the original subdivisions. Due to the accretion on the north side of the island, Mr. Cook performed an extensive survey in Section 25, T. 9 S., R. 6 W., and Sections 18 and 19, T. 9 S., R. 7 W. He also surveyed Sections 13, 23, and 24 of T. 9 S., R. 8 W., which had formed entirely by accretion.

In 1979, Cadastral Surveyor, Stephen G. Kopach, conducted a dependent resurvey of Horn Island, Sections 25, 26, 27, 33, 34, 35, and 36, Township 9 South, Range 6 West. At the time of this resurvey, Horn Island had eroded to such an extent that, of these sections, only a portion of sections 27, 33 and 34 remained. The existing sections were again reallotted to accurately depict dependent resurvey.

6. Further evidence of Federal ownership

Another indication of Federal ownership is the reservation of a portion of Horn Island for military purposes by presidential order of August 30, 1847. Since then Horn Island has been reserved for military purposes on several occasions. Clearly, if the land had been privately owned, it could not have been reserved for military purposes.

In fact, the *Federal Register* notice dated May 20, 1958, creating the Horn Island National Wildlife Refuge, revokes the 1847 reservation and states that

"The lands were transferred to the control of the Secretary of the Interior for disposition under the act of July 5, 1884, by Executive Orders of October 25, 1895, and August 25, 1900." The notice goes on to revoke other Executive Orders dealing with Horn Island from 1900 and 1906.

There is an abundance of evidence of Federal ownership of Horn Island through the years. Unfortunately, the tax assessor of Jackson County ignored this evidence and "sold" you land which was not his or hers to sell as this land was and is still in the possession of the Federal Government.

7. Ownership of minerals is also Federal.

Since we contend that you never owned any land on Horn Island, we accordingly contend that you never owned any minerals either. However, if you ever had a claim to any minerals on the island, it was renounced in 1982 when you signed the settlement agreement with the U.S. Government. The December 3, 1982 judgment and order of U.S. Magistrate Roper clearly states that title was quieted in the U.S. "with regard to all lands *and interests in lands*" on Horn Island and that "the United States has title in fee simple absolute to . . . the subject property." "Title in fee absolute" includes title to the surface and subsurface, including any minerals.

Conclusion

To summarize, the BLM finds that you do not have a valid claim to any land or minerals on Horn Island and that, therefore, you are not entitled to the patents you have requested. The land in question is owned by the Federal Government and has been since 1803, when it came into the U.S. as part of the Louisiana Purchase. Any claim you may have had was disposed of by your decision to settle the quiet title action in 1982. There is no affirmative evidence that the Spanish land grant you provided was ever properly confirmed and without such evidence the 1982 judgment stands and BLM is without power to issue you a patent.

When Federal land is sold by the BLM it is sold pursuant to Federal law, not State law or county ordinances. Individual states and counties in each state do not have authority to sell Federal land. Therefore, Jackson County did not have authority to sell you any land on Horn Island as this land was and is still in the possession of the Federal Government. In 1950, the Jackson County Tax Assessor may have represented to you that he had authority to sell you land on Horn Island, but he was wrong. Your recourse is not against the Federal Government, but against Jackson County. Barring any limitations problem (i.e., your claim may be too late), you might wish to seek relief against the county.

We have thoroughly researched your claims to the land on Horn Island and both management and staff have spent countless hours reviewing the facts in this

case. We have also been working closely with the Solicitor's Office, which concurs in our decision and in this letter.

It is our position that the BLM has done all that we can to assist you in finding answers to your lingering questions. At this point, we do not feel there is anything else we can do to assist you and this letter represents our final decision in this matter. If you still feel you have been wronged, your only recourse is through the U.S. judicial system.

Sincerely,

DENISE MERIDITH

DENISE MERIDITH
State Director, Eastern States

cc: Senator Thad Cochran
United States Senate
Washington, DC 20510-2402

Senator Trent Lott
United States Senate
Washington, DC 20510-2403

Honorable G. V. "Sonny" Montgomery
House of Representatives
110-d Airport Road
Pearl, Mississippi 39208
Attn: Mr. Dan Kimbrough

Wilson Carroll
Assistant District Attorney
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

Christina Clark
Department of the Interior
Office of the Solicitor

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action Number: 1:94cv264RR

CHRIS W. BEGGERLY, ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT OF JAMES RALEIGH BEGGERLY

STATE OF MISSISSIPPI

COUNTY OF HINDS

Personally appeared before me, the undersigned authority in and for the aforesaid jurisdiction, James Raleigh Beggerly, who stated on his oath the following:

1. My name is James Raleigh Beggerly. I am an adult resident citizen of Axis, Alabama and am competent to testify. I have personal knowledge of the facts set forth in this affidavit.

2. I grew up in Rankin County, Mississippi. I left Mississippi to go into the military service in 1942. After over three years of continuous overseas service, I returned in 1946. After my return, my father asked me to buy property with him on Horn Island. I told him okay but not to go above a certain amount. My father came back later and told me I owned three miles on Horn Island. My father bought two tracts, one of which was in my name.

3. I was called to service again during the Korean War from January 1951 to 1953 for 23 months.

4. While I was in Korea, my father employed an attorney named H. G. Rowland in Lucedale, Mississippi to clear up any question about our title in the Jackson County Chancery Clerk's office. Mr. Rowland had gotten patents and they had been recorded, but there as a question among people at the courthouse about the patents which were issued in 1840. Mr. Rowland filed a suit to clear up questions about these patents, but we decided not to follow through with it at that time.

5. I always assumed that we had a good title. We paid our county taxes each year, including our assessment for the Pascagoula school district and planned to keep the property as a long-term investment.

6. In March 1959, I noticed an article in a local paper about certain properties on Horn Island being transferred from one government bureau to another. To be sure there was no question about any of my property being involved, I wrote the Manager, Bureau of Land Management, Russelville, Arkansas listing my property by lot, section, township and range and asked if there was a conflict between the land I owned and the land listed as property of United States. I received an answer that "none of the tracts you listed in your letter to this office show as public domain prior to the withdrawal by the Fish and Wildlife Service."

7. In 1971, President Nixon signed into law a bill which authorized acquisition of land for the Gulf Island National Seashore. Shortly thereafter, my brother, Chris Beggerly, and I were invited to go on a

boat trip to the island along with other property owners. This trip was arranged by the Department of Interior. The boat was the Sea Queen captained by a Mr. Ralph Baker at Biloxi Yacht Basin. Other land owners, government representatives and Ed Turner, a land appraiser employed by the Department of Interior, were all on board. The government representatives pointed out where our property began on the island and dropped us off at that point with the understanding that they would pick us up approximately four miles down the beach where our property ended. We spent most of the day on the island looking at the property and then were picked up at the far end as planned.

8. In September 1971, I was contacted by Mr. John S. Creighton, Land Acquisition Officer for the Department of Interior. We discussed the government's desire to establish the Gulf Island National Seashore Park, and the need of the government to acquire private property on the island. He showed me copies of title insurance information prepared for the Department of Interior by the Lawyers' Title Insurance Corporation and the Mississippi Abstract Title and Guaranty Company which conclusively showed the subject property, Sections 27, 28 and 29, Township 9 South, Range 6 West titled to James R. Beggerly, and certain lots of Section 30, Township 9 South, Range 6 West as being titled to my father, C. M. Beggerly, Sr., deceased; thus owned by his surviving heirs. I asked for copies of these titles and Mr. Creighton later sent copies to me. Mr. Creighton said the Department of Interior had the property appraised, and he made me an offer of $156,000 to purchase the land "fee simple." In this conversation, Mr. Creighton informed me a

mineral appraisal had also been made and the minerals had been determined to have a value of "zero." I informed Mr. Creighton I was in no way prepared to accept their valuation of mineral rights as "zero" value. After a brief exchange between us, Mr. Creighton handed me a contract to sign if and when I changed my mind. He then gave me a very sage piece of advice I shall never forget, to-wit: "Mr. Beggerly, there is something you need to know. In the end, we will have your property and it will be on our terms and our conditions. We will either wear you out, break you, or both."

9. Subsequently, I was contacted by Mr. Edward H. Krippes from the Department of Interior who simply repeated Mr. Creighton's offer. Therefore, we did not make any progress.

10. In 1975, a Mr. Burton Winkle contacted me and informed me that he had replaced Mr. Krippes. In the interim, I had employed an attorney to advise me regarding the patents on the property. When Mr. Winkle contacted me, I advised him that there might be a problem and, therefore, I was not interested in attempting to convey title until I could get it cleared up. He assured me that he was not concerned about any title problem and we agreed to meet on October 22, 1975, at a restaurant in Gulfport. My brother, Chris Beggerly, and I, along with our wives, met with Mr. Winkle and discussed the sale of the property. I had become interested in selling the property at this time since I was under intense pressure at work and needed to get this continuing bother out of my way so that I could concentrate on my work. At that time, I was Assistant Plant Manager of Barry Electric Generating Plant in Mobile, Alabama, supervising ap-

proximately 460 employees. I felt that I could not continue to negotiate with the government concerning this property and meet my other responsibilities to my job and my family. Even through Chris continued to feel very strongly that we should not sell, we agreed that because of my special concerns, we would negotiate the best deal possible.

11. After several hours of discussion with Mr. Winkle, I accepted his offer and a contract was signed for me to sell my property. Although Mr. Winkle assured me that they had no concern about my title, he asked me to give him my attorney's opinions concerning the patents and I agreed to do so. I left the table understanding that I had a firm deal and that I would sell my property. Although I was not happy with the terms or how I had been treated, I simply felt that I had to unload this burden at this time. Mr. Winkle wrote out a check for $157,500 and told me this would tie up funds, but he had to have the letter concerning the patents from our attorney before he could close the sale. Shortly thereafter, I received a letter from the government confirming that we had made a binding contract. Then on March 22, 1976, after hearing nothing from the government and receiving no money, although I had been promised prompt payment, I received a letter from Mr. Winkle advising that the contract had been cancelled and expressing his sympathy.

12. After receiving the letter from the Department of Interior that they were cancelling the contract to purchase my property, I heard nothing further from the United States concerning its interest in purchasing or otherwise. Therefore, I continued to pay taxes on the property and assumed that I would not need to

bother with the government any further. I did make a diligent effort to try to learn exactly why the government had reneged on its contract, but I was totally unsuccessful in that regard.

13. On September 25, 1979, a federal marshall showed up at my house and served me with a summons from the United States government. The complaint attached to the summons stated that the government had sued me to quiet title on my property. The government was now saying that I had no title at all and that they were taking the property without compensation. This would have been bad enough, but at the time the marshall showed up, I was trying to dig out from the disaster created by Hurricane Frederick. I had four trees down on top of my house when the marshall arrived. Therefore, I directed him to deliver the papers to my wife. Little did I know that another storm was brewing.

14. After I got over the initial shock that the government was suing me, I got with my brother, Chris, and we began to develop a strategy for a defense. We hired a lawyer and also began to do research concerning the patents. We also looked into the existence of other bases for our title including foreign grants from other governments. While I am not a historian or an archivist, I decided to learn how to do historical research on my own to support the efforts of our attorney. I personally did research in the chancery clerk's records in Mobile, Alabama, looking at the early Spanish land title records. Subsequently, I looked at the Mobile County Courthouse records in what is known as the Spanish translated records. My wife and I did research in Montgomery, Alabama, at the Montgomery Archives. My wife and I also went to

Washington, D.C. and did research at the National Archives in D.C. and at the BLM office in Suitland, Maryland. We also did research in New Orleans at Loyola University and at a Spanish archive in New Orleans. Also, the wife of one of my employees, Gloria Wier, learned about my efforts and became interested in assisting me. She did independent research at a number of places including the Archives of Mobile County and Mobile City, the Jackson County Public Library in Pascagoula, Mississippi, the library at the University of Alabama and at a college in Pensacola. She and her husband also did research at the National Archives in Washington, D.C. and met with Mr. William Dorasavage. I was in communication with our attorney, Jim Martin, throughout this time period exchanging information and documents with him.

15. When the court date came up, we were interested and willing to go forward with our lawsuit, but our counsel advised us that because we had not been able to come up with the necessary patent or grant, we would not be able to win. The court had, based on the evidence before it, determined that the Louisiana Purchase controlled and I realized that we did not have any valid patent or grant which had been made out of the United States government after the Louisiana Purchase. I understood that we were in a bad situation. Nevertheless, Chris and I avoided settling the lawsuit until our attorney told us that everyone else was settling and we really did not have any option. At that time, we told him that we would not be willing to convey our title. Our attorney did whatever negotiating was done. We had no involvement in that and he ultimately told us that it was a done deal and that it was over. Therefore, we packed up and went

home somewhat confused and upset about the ordeal. At some point later, we received our settlement check for compensatory damages.

16. After we got our wind back, we decided that we would keep going and whatever the legal consequences were, we would somehow prove that we had a valid title. For the next several years, the primary effort that was made was made by my brother, Chris, who began contacting anyone and everyone, particularly government officials to gain a foothold and find a new direction for us to take. He pursued Freedom of Information Act requests and other efforts and kept me fully advised as he went along. Finally, in 1991, he identified a genealogist in Washington, D.C. who he believed could help us. Her name was Edith F. Axelson. Once he had contacted Mrs. Axelson, given my extensive research, he asked that I talk with her and give her direction on the background of what we had done and what we wanted her to do. I had become convinced that the most likely source of a grant would be from the Spanish government during the latter part of the Eighteenth Century when Spain had sovereignty over the area. Therefore, I asked Ms. Axelson to do research at the National Archives looking for Spanish grants during this time period. We agreed upon terms and she pursued her research which extended over several weeks. She later advised me that she had found a Spanish grant of Horn Island and forwarded to me the document which we now refer to as the Boudreau Grant.

17. After we received this grant which appeared to us to be a complete grant of Horn Island, we realized that we did not have the expertise to determine the legality of the document and, therefore, we employed

legal counsel and began an effort to identify experts who could help us.

18. My brother, Chris, got in touch with the Mississippi Archives and a Dr. Galloway who had testified in the original trial. She was encouraging, but stated that she was not a fully qualified expert.

19. We then contacted an expert in New Orleans named Mr. William D. Reeves who did some historical research. After talking with Mr. Reeves and several other experts, we learned that Dr. Hans Baade at the University of Texas Law School was a preeminent expert on Spanish grants. We employed Dr. Baade, who issued an exhaustive opinion finding that the Boudreau Grant was a valid grant. We then filed our lawsuit to vindicate our rights.

20. I have visited the courthouse in Pascagoula on several occasions since this came up and on my most recent visit I obtained certified copies of our tax deeds from the land records. I also obtained a copy of the map which was used for preparing the descriptions in our tax deeds. A copy of said map is attached hereto as Exhibit "A."

21. Chris and I have made substantial personal and economic sacrifice over the years in regard to this matter and, of course, I would like to see us properly compensated if we are entitled to it. However, my primary objective, after serving in combat in two wars for this country and after enjoying the privilege of a good life in peace time, is to do my part to see to it that our government respects private citizens and their rights.

This, the 9th day of March, 1995.

Respectfully submitted,

/s/ JAMES R. BEGGERLY
JAMES RALEIGH BEGGERLY

Sworn to and subscribed before me on this, the 9th day of March, 1995.

/s/ GWEN B. ALLEN
Notary Public

My Commission Expires:

My Commission Expires July 16, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. 1:94cv264RR

CHRIS W. BEGGERLY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT OF EDITH F. AXELSON

STATE OF VIRGINIA

COUNTY OF FAIRFAX

Personally appeared before me, the undersigned authority in and for the aforesaid jurisdiction, Edith F. Axelson, who stated on her oath the following:

1. My name is Edith F. Axelson. I am an adult resident citizen of Fairfax County, Virginia and am competent to testify. I have personal knowledge of the facts set forth in this affidavit.

2. I am a certified genealogical record specialist. This means that I do research in original and published records, understand all genealogical resources and provide detailed information concerning the contents of the records examined. I have twelve years experience doing record research. I have extensive experience doing research at the National Archives in Washington, D.C.

3. Early in March 1991, Mr. Chris Beggerly contacted me and asked if I could assist him with doing research regarding evidence of land titled to Horn Island off the Gulf Coast of Mississippi. After agreeing upon terms, I began doing my research. I went to the National Archives in Washington, D.C. and, with the assistance of staff, identified all files which might contain evidence of land grants in this area which were made in the late 1700s. While I do not remember the exact number, I believe there were approximately seventy-five filed identified. I then began methodically going through each file. After spending substantial time over a period of several weeks reviewing these files page by page, I located the Boudreau Grant documents, which are attached as Exhibit A.

4. These documents are on file in the Civil Records Branch of the National Archives in Washington, D.C., in Item Number 126, Volume 203, RG 49, Division "D" at pages 361-364. They are also found in a book of abstracts, RG 49, Division "D", Number 338, Volume 229, reference under Number 6, line item 51. Upon finding these records, I forwarded them to Mr. Beggerly.

5. Last week, Mr. Jim Beggerly asked that I obtain certified copies of the Boudreau documents. On March 8, I returned to the National Archives, located the Boudreau documents in the files where I originally found them and requested copies. Unfortunately, unless I can persuade the staff to expedite this request, which I will try to do, I will have to wait a month to obtain the copies. I will then take them to another office to have them certified and forward them as soon as I can.

6. Mr. Beggerly has asked how I found these documents when other experts were unable to do so. Of course, I do not know the answer to this, but I do know that as a genealogist, my research is often much more flexible and much broader than that which is done by someone with the specific purpose of identifying records relating solely to land titles. I have learned to search for names and interrelationships of parties which often turns up historic documents of little or no value to the party who is trying to establish a chain of conveyances for land title purposes. Since we approach our research differently, it is not surprising that a document which is not indexed according to a particular protocol might turn up in my research while being missed by others who have other purposes.

This, the 9th day of March, 1995.

Respectfully submitted,

/s/ EDITH F. AXELSON
EDITH F. AZELSON

Sworn to and subscribed before me on this, the *9th* day of March, 1995.

/s/ KAREN A. DREYER
NOTARY PUBLIC

My Commission Expires:

December 31, 1998

"BOURDEAU GRANT" RECORDS IN NATIONAL ARCHIVES

[This is a typed reproduction of the document in evidence, which appears in cursive.]

To the Commissioner of land claims east of Pearl-River

Sir

Please take notice that the heirs of Catalina Vincenardu Viuda Beaudreaux claims a tract of land, to wit "le Isle a horn" or Horn Island situate in the Bay of Pascagoula on the Mexican gulph by virtue of a grant from the Spanish Government dated in New Orleans 1 of August 1781 as will appear by the grant hereto annex'd.

E. Lewis Agent for the Claimants

Mr. Governor-General

Catharine Budro, an Inhabitant of Pascagoula with the greatest respect represents to your Excellency; that when she was at Mobile you had condescended to offer to give her Horn-Island; wherefore she supplicates your Excellency to grant her the said Island; a favor she expects from your well known charity: New Orleans 3 of July 1781. For Catharine Budro her Son signed -

John Badlela Bodro

New Orleans 4 July 1781

So far as regards the land which this person petitions for is in the Jurisdiction of Mobile, she will apply to the Commandant of that place, that when he is informed of this claim he can do that Justice it is entitled to.

Galvez

Mobile 21 July 1781

The Island which the claimant solicits is represented in the annex'd Plat to its extent; the land consists of Pasture & Trees, is a Royal possession— the Commanding General, by his order on form, will determine what may appear to him meet.

Henry Grimarest

From the French

Horn Island; running from east to west; its length, is about six leagues, or more; its breadth varies in different places; in one of them it is only one quart of a league, and in the other, one half & more—

There was a time, when 10 or 12 English people, wished to form a company to establish a cow-pen, upon the present Island, of which Mr. Grasit was one; but that did not take place; & to-day it only recognized as a property belonging to his Catholic Majesty.

BERNARD de GALVEZ, a pension'd Knight of the Royal and distinguished Spanish Order of Charles the third, Colonel of the Royal Army, governor, Intendent and Inspector General of this Province of Louisiana, &

Having seen the preceding documents (diligencias) executed by Lieut. Colonel Henry Grimarest, Commandant of the Town of Mobile, & to the possession which he has given to Catharine Vincenaudi, widow Beaudreaux of the Island commonly called Horn-Island, situated upon the Coast of Mobile running from east to west, containing about six leagues, as exhibited in the accompanying plat—and acknowledging to be conformable to the Order of Survey, without causing prejudice to the aforesaid Inhabitants, which they neither have claim'd rather consented as their assistance justifies said operations. Approving of

them as we approve of them, using the authority which the King has conferr'd to us, We grant in his Royal name to the said Catherine Vincenaudi, Widow Beaudros the said Horn Island, situated upon the aforesaid Coast of Mobile, that as her own she may dispose of and enjoy of, governing herself by said documents (diligencias) and conforming to all that is required (lo dispuesto) by the regulation of this subject we give the present signed by our hand, sealed with the Seal of our Arms & countersigned by the underwritten Secretary for his Majesty's government—in New Orleans 1st August 1781.

Ber^{d}. de Galvez

(seal)

By Order of His Lordship—
Andrew Arrnesto

VOLUME

203

LAND CLAIMS,
EAST OF PEARL RIVER,

EVIDENCE BOOK

B

[Tag attached reads as follows:]

DIV. D Private Land Claims

Item 126, Record of evidence
filed with the Brd. of Land
Commrs. for the area East of
the Pearl River, Miss.,
1813-14 (Vols. 202-204)
3 vols.

that it has been about twelve years since he ceased to cultivate the said land ; that the Indians stole his Corn & his Negroes which were at work on the place were threatened to be killed by the Indians, which caused him to quit the said place.—

Jacob Bend being sworn saith that Mr. Baudreaux kept some Negroes upon Horn Island about five or six Years, for the purpose of attending to her stock ; that it has been about eighteen years since they ceased to live upon the Island ; but that Cattle have been kept upon the Island until the present time.—

To the Commissioner of Land Claims East of Pearl River

Sir

Please take notice that the heirs of Catalina Vincenarde Veuda Beaudreaux claims a tract of land, to Wit le Isle a Corn or Horn Island situate in the Bay of Pascagoula on the Mexican Gulph by virtue of a grant from the Spanish Government dated in New Orleans 1 of August 1781 as well appear by the grant hereto annexed.

E. Lewis Agent for the Claimants

Mr Governor-General

Catharine Budro, an Inhabitant of Pascagoula with the greatest respect represents to your Excellency; that when She was at Mobile you had condescended to offer to give her Horn-Island; wherefore she supplicates your Excellency to grant her the said Island; a favor she expects from your well known charity: New Orleans 3 of July 1781.— For Catharine Budro her Son signs.—

John Badilla Bodro

New Orleans 4 July 1781.

So far as regards the land which this person petitions for is in the Jurisdiction of Mobile, she will apply to the Commandant of that place that when he is informed of this claim he can do that Justice it is entitled to.

Galvez

Mobile 21 July 1781.

The Island which the claimant solicits, is represented on the annexed Plat to its extent; the land consists of Pasture & Trees, it

BEST AVAILABLE COPY

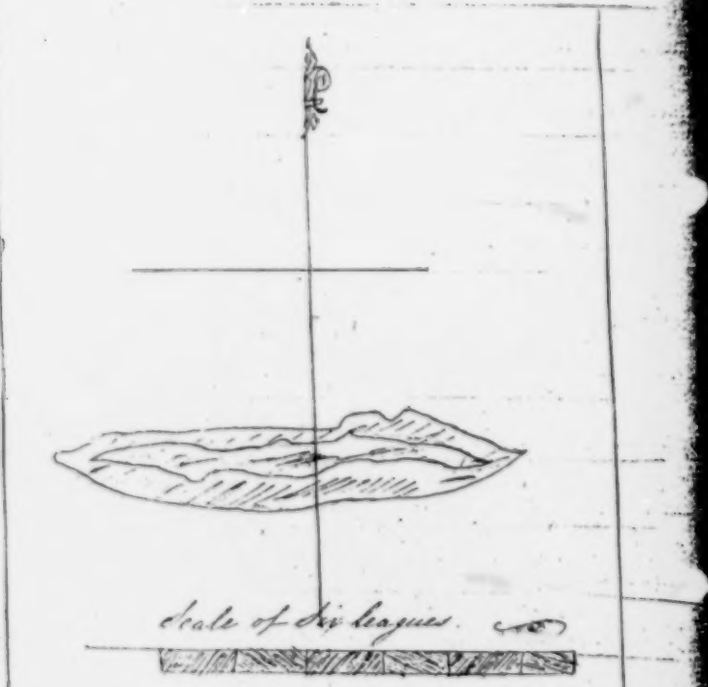
what may appear to him most.—

Henry Guimarest

From the French.

Horn Island; running from East to West; its length, is about six leagues, or more; its breadth, varies in different places; in one of them it is only one quart of a league, and in the other, one half & more.—

There was a time, when 10 or 12 English people, wished to form a Company, & to establish a Cow-pen, upon this present Island, of which Mr. Grant was one; but that did not take place; & to-day it only recognized as a property belonging to his Catholic Majesty.—



Bernard de Galvez, a pensioned Knight of the Royal a
distinguished Spanish Order of Charles the third, Colonel of the Royal Army, Governor, Lieu
dent and Inspector General of this Province of Louisiana, &c.

Having seen the preceding documents (diligencias) execu
by Lieut Colonel Henry Guimarest, Commandant of the Town of Mobile, re
to the possession which he has given to Catharine Vincenaude, widow Beaudreau,
of the Island commonly called Horn-Island, situated upon the Coast of Mobile
running from East to West, containing about six leagues, as exhibited in the
accompanying plat.— And acknowledging to be conformable to the order
Survey, without causing prejudice to the aforesaid Inhabitants, which they
neither have claimed rather consented as their assistance justifies said
operations.— approving of them as we approve of them, USING the
Authority which the King has conferred to us, We grant in his Royal
name to the said Catharine Vincenaude, Wid. Beaudros the said Horn
Island, situated upon the aforesaid Coast of Mobile, that as her own she
dispose of and enjoy it, governing herself by said Documents (Diligencias) as
conforming to all that is required (lo dispuesto) by the regulation of this Isl
We Give the present signed by our hand, sealed with the Seal of o
Arms & countersigned by the undersmitten Secretary for his Majesty's

Government. — at New Orleans 1st August 1781. —

Ber.d de Galvez

seal

By Order of His Lordship.
Andrew Arnesto

To the Commissioners of Land Claims East of Pearl River

Sirs

Please take notice that I claim a tract of land lying on the River Pascagoula, at the entrance of Cedar Creek, quantity unascertained, by virtue of a permit from the Spanish Government dated the 30th of March 1810. —

Louisiana, East of Pearl River, } ss
27th Jan.y 1814

Translation, from the Spanish)

Margaret Guillot, an Inhabitant of the town of Pensacolas with due respect presents herself before you & Says, that being desirous of removing to this Post with the Corps family that she has, consisting of her eldest Son, two daughters one married with three Sons, and as she is now encumbered with six Servants & has no manner of employ for them, - learning a vacant tract of land at the entrances of Cedar Creek on this River, which from its Situations is surrounded by the Lakes & Creeks which I now mention, one & half leagues to the entrance of Lake Mer; two leagues from Mills Creek; also one leagues to Bayou Ward; and one leagues to Bayou Lefait Lake, & half a leagues also to Lake Goodin; Wherefore she petitions you to grant her what she solicits to erect on the aforesaid tract of land the houses, for her own residences and that of her Servants, & to make a Cow-pen, the clearances & other works for farming — which is a favor &c. —

Pascagoulas 28 March 1810

Margaret Goguity

Pascagoulas 30th March 1810

In consideration of what the Petitioner represents I grant her permission to establish herself on the place she mentions, said Grant serving her in preference (de preminencia) to any other persons, to present it to the Commandant of the town of Mobile, for his approbation & all other busi-

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action Number: 1:94cv264RR

CHRIS W. BEGGERLY, ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT OF JAMES L. MARTIN

STATE OF MISSISSIPPI
COUNTY OF HINDS

Personally appeared before me, the undersigned authority in and for the aforesaid jurisdiction, James L. Martin, who stated on his oath the following:

1. My name is James L. Martin. I am an adult resident citizen of Jackson, Mississippi and am competent to testify. I have personal knowledge of the facts set forth in this affidavit.

2. I am currently a practicing attorney with the law firm of Martin and Young. In 1979 through 1982, I represented several landowners in litigation initiated by the United States Government to take and/or quiet title to Horn and Petit Bois Islands on the Mississippi Gulf Coast. More specifically, in regard to Petit Bois Island, I represented John Stocks and corporate business entities in which he was an equity owner in *United States of America vs. 717.42 acres of land*, Civil Action No. S80-0450(N), United States District

Court, Southern District of Mississippi, Southern Division. (A copy of the Petit Bois Complaint is attached as Exhibit "A".) In regard to Horn Island, I represented Chris Beggerly and his family as well as several other defendants in *United States of America vs. Andrew J. Adams, et al.*, Civil Action No. S79-0338(R). In the Petit Bois suit, the government acknowledged that the property at issue was privately owned and filed a condemnation suit to take the property; therefore, the principal issue in that litigation was the amount the government owed the private landowners for the fair market value of their property. In the Horn Island suit, the government sought to quiet title rather than to condemn the properties as it did in the Petit Bois suit. The government claimed in its complaint in the Horn Island suit, as well as throughout the litigation, that there were no valid patents or grants which conveyed the government's interest to private citizens and, therefore, the private titles were not valid.

3. To defend the Beggerlys' interest, I worked with counsel for the State of Mississippi, Mack Cameron, to develop the necessary proof of title. Our efforts included hiring experts including Richard Lackey, a highly qualified archivist with extensive experience. Mr. Lackey went to Washington and did independent research at various archives. Through his efforts and other sources, I obtained and reviewed documents which evidenced private habitation, cultivation and use of Horn Island going back to the Eighteenth Century, but not a confirmed grant or patent. We also deposed employees of the USA who were charged with the responsibility of maintaining land records including William Dorasavage, Chief, Branch

of Lands and Title Adjudications for the Department of the Interior, Bureau of Land Management, Eastern States Office, Alexandria, Virginia, and a member of his staff, Michael Knipfing, who did the basic records search for the government in support of the litigation. I assisted with the taking of the Dorasavage deposition. During that deposition, Mr. Dorasavage went into detail to explain the organization of the records and the extensive research done by his office before, and after, filing the quiet title action. Mack Cameron made a trip to Washington, D.C. and did research at the various archives in D.C. Over a three-year period, I reviewed numerous documents, did extensive research and talked with various government personnel in the Bureau of Land Management and other state and federal agencies in an effort to locate a valid patent or grant. Throughout this three year period, both Chris and Raleigh Beggerly gathered government title documents through their independent research at various archives and government record repositories. We exhausted all resources in search of a grant or patent. Unfortunately, as we approached the trial date, we did not have the necessary grant or patent to support our claim. The Court granted partial summary judgment dismissing our basic defenses and made it very clear to all defendants that without a valid grant or patent to support their claims, they had no claim.

4. As we approached the trial date, the lead counsel for the USA, Steve Hermann, advised that he thought that he could come up with some funds to assist with settling the lawsuit. Ultimately, he did come forward with some funds from a source unknown to me and agreed that the parties could share in these funds if

they would settle the lawsuit. We negotiated and signed a settlement and a judgment was entered terminating the litigation.

5. At no time during the settlement negotiations was there any discussion about the landowners transferring their title to the federal government. The government took the position that the landowners did not have title and that the settlement money was being paid simply as a means to conclude the litigation and to avoid the expense and risk of trial. Prior to negotiating the Horn Island settlement, we had received the Court's ruling in the Petit Bois litigation which determined that the Petit Bois surface estate (exclusive of the minerals) was worth over $8,000 per acre; therefore, the government, the Beggerlys and the other parties knew that the approximately $200 per acre was only a fraction of the value of the property. (The Court's Petit Bois opinion is attached as Exhibit "B".)

6. The Beggerlys did not want to settle the lawsuit and felt very strongly that they owned their property and that their title was good. Only after all other parties had agreed to the settlement, they reluctantly agreed.

7. I have been advised by the Beggerlys' present counsel that they have discovered a Spanish grant which they believe is a valid and binding grant. This certainly is a new and interesting discovery. I was not aware of any such grant until I talked with Ernest Taylor recently.

This, the 15th day of March, 1995.

Respectfully submitted,

/s/ JAMES L. MARTIN
JAMES L. MARTIN

Sworn to and subscribed before me on this, the 15th day of March, 1995.

/s/ JILL R. CHANDLER
Notary Public

My Commission Expires:

9/22/95

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. 1:94cv264RR

CHRIS W. BEGGERLY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT OF HANS W. BAADE

STATE OF TEXAS

COUNTY OF TRAVIS

Personally appeared before me, the undersigned authority in and for the aforesaid jurisdiction, Hans W. Baade, who stated on his oath the following:

1. My name is Hans W. Baade. I am an adult resident of Austin, Texas and am competent to testify. I have personal knowledge of the facts set forth in this affidavit.

2. I am currently the Hugh Lamar Stone Professor of Civil Law at The University of Texas at Austin. I currently teach, or have taught, public international law, international transactions, the conflict of laws, comparative law, Texas and southwestern legal history, United States and Texas public land and natural resources law, and international and comparative oil and mineral law.

3. My educational background is as follows: I received a B.A. degree in political science from Syracuse University in 1949 and a Doctor of Laws degree, *cum laude*, from the University of Kiel in West Germany in 1951. From 1951 to 1953, I served in the U.S. armed forces, mainly in a military intelligence unit. Thereafter, from 1953 to 1955, I studied law at Duke University and received both an LL.B. degree, with distinction, and an LL.M. degree in 1955. In 1956, I attended the Hague Academy of International Law in the Netherlands and received a diploma from that academy.

4. I am a member of the American Society of International Law and the American Foreign Law Association, a Director of the American Society of Comparative Law, a member of the editorial board of the American Journal of Comparative Law, and an associate member of the International Academy of Comparative Law. (Attached as Exhibit "A" is a more detailed biographical statement.)

5. In August, 1993, I was contacted by Ernest Taylor, one of the attorneys for the Plaintiff, who asked that I evaluate and determine the legal effect of a document which Mr. Taylor refers to as the "Boudreau Grant." The document is more particularly described as a grant (or concession) dated August 1, 1781, by Bernardo DeGalvez (at that time the Governor Intendent, and Inspector General of Spanish Luisiana) to Catarina Boudreau, an English translation of which is found in Volume 203, Land Claims East of the Pearl River, Evidence Book B, Item 126 (National Archives, Washington, D.C.). This document was part of the original record of the First Report of the Land Commissioners East and West of

the Pearl River, on private land claims of January 5, 1816.

6. My education, training and experience which is relevant to the analysis of the Boudreau Grant includes the following: In connection with research for several article on Spanish and Mexican law in the Southwestern United States published between 1975 and 1983, I worked in the National Archive in Madrid, the Archive of the Indies in Seville, the Historical Archive of the Nation of Mexico City, the Archive of the Audiencia of Guadalajara in the city of Guadalajara, Mexico, and archives and court house records in the United States from New Orleans to Sonoma County in California. Frequently consulted on questions of historic land and water rights since that time by (among others) the Texas Water Commission and Attorney General as well as the New Mexico State Engineer, I have been employed as an expert on historic land and water rights, in particular, in *State ex rel. Martinez v. City of Las Vegas*, 880 P.2d 868 (N.M. App. 1994) (the "Pueblo Water Rights" case); *In re Adjudication of Water Rights in the Medina River Watershed of the San Antonio River Basin*, 670 S.W.2d 250 (Tex. 1984), and *Alabama Coushatta Tribes v. United States* (U.S. Claims Court Congressional Reference, 1986), approved by Act of Congress, 102 Stat. 1097 (1988).

7. After accepting employment and reviewing the Boudreau Grant, I determined that certain additional research was appropriate. Therefore, I did the following: I reviewed the pertinent materials in the *American State Papers: Public Lands* relating to Louisiana, West Florida, and (for additional background) East Florida, historical and legal accounts

pertinent in relation thereto, the jurisprudence of the Supreme Courts of Louisiana and of the United States and of lower federal courts, historical accounts of the Mobile District and of Spanish Alabama and Mississippi, my prior extensive work on the public land law of the Louisiana Purchase in connection with the *Alabama Coushatta Tribes* case, and sources on the Mobile and Pensacola campaigns of Governor Galvez.

8. In late September 1993, I completed my work and prepared and delivered the memorandum on the title to Horn Island which is attached hereto as Exhibit "B." Since delivering a slightly revised report on that document in October 1993, I have done further historical research in the Translated Records archived in the Probate Court, Mobile County, in Mobile, Alabama, as well as microfilm sources from the Archive of the Indies on deposit at Loyola University, New Orleans. This additional research served to support and corroborate my prior opinion.

9. In summary, as is set out in detail in my attached memorandum, Exhibit "B", my opinion concerning the Boudreau Grant is as follows:

a. The Boudreau Grant is a legitimate, authentic grant of Horn Island to Catarina Boudreau, a prominent citizen and landowner in the area at the time of the grant. The grantor, Governor Hernando de Galvez, had authority to make the grant to Catarina Boudreau and the grant was a complete and final grant when made, fully in compliance with the Spanish territorial law pertinent to the time and place where made.

b. Since the Boudreau Grant was a valid and complete Spanish land grant, its validity was accepted by the United States by the 1819 Treaty of Amity, Settlement, and Limits between Spain and the USA. Therefore, the fact that it was not confirmed as a settlement grant when presented to the U.S. land commissioners in 1816, was irrelevant. *See United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

c. Since the grant was a valid and complete Spanish grant, recognized as valid by treaty between Spain and the USA, the subject property never became part of the public domain of the USA, by virtue of the Louisiana Purchase in 1803 or otherwise. The property continued as private property and was not transferred by Spain to the United States.

d. Since Horn Island never became the property of the USA, it was subject to the laws of the State of Mississippi applicable to private property including the laws providing that a county may sell property within its jurisdiction for delinquent taxes.

e. The United States Government received the Boudreau Grant in 1816 and has had it in its continual possession since that date. Unfortunately, the Boudreau Grant, having been made in 1781 by the Spanish government and approved by treaty, though complete, valid and binding, was never reflected in the USA tract books or in official surveyors' plats, which reflect grants by foreign sovereigns so as to indicate their unavailability for entry, selection, or other disposal under United States public land laws. It

fit into a special category and, therefore, was never properly indexed. At the time that the United States Government filed the Adams-Beggerly action and represented to the Court, the Beggerlys and other litigants, that there were no foreign land grants ever issued on Horn Island, the United States Government was in functional and institutional control of the Boudreau Grant. Therefore, the "Stipulation and Settlement" incorporated by reference in the Judgment of December 3, 1982, was based upon a misstatement of a crucial fact when the United States Government alone had official and institutional knowledge of (and access to) the truth.

This, the 9th day of March, 1995.

Respectfully submitted,

/s/ HANS W. BAADE
HANS W. BAADE

Sworn to and subscribed before me on this, the 9th day of March, 1995.

[seal omitted] /s/ DEBORAH STEED
NOTARY PUBLIC

My Commission Expires:
12/15/98

Memorandum on Title to Horn Island

Hans W. Baade
Hugh Lamar Stone Chair in Civil Law
The University of Texas School of Law

Prepared for

Watkins Ludlam & Stennis

October 1993
Austin

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* This memorandum does not purport to express opinions of, or attributable to, The University of Texas at Austin.

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Introduction

Horn Island is located in the Gulf of Mexico, about a dozen statute miles off the coast of the State of Mississippi somewhat to the east of Pascagoula, the county seat of Jackson County. It presently forms part of the Gulf Islands National Seashore, established pursuant to an Act of Congress dated January 8, 1971. 84 Stat. 1967.

Section 2 of that enactment provided essentially two means for the acquisition of lands for this National Seashore. First, the Secretary of the Interior was authorized to acquire "lands, waters, and interests therein by donation, purchase with donated or appropriated funds, or exchange" within the boundaries of the seashore, defined so as to include "Ship, Petit Bois, and Horn Islands in Mississippi." *Id.* Sec. 2(a); 1(1). Secondly, any Federal property within the seashore as thus defined could be "transferred without consideration to the administrative jurisdiction of the Secretary (of the Interior) for the purposes of the seashore." Sec. 2(a) *in fine*.

Seeking to avail itself of this latter alternative, the United States instituted proceedings in 1979 to quiet title to Horn Island. *United States v. Adams, et al.*, Civ. No. S79-0338 (R) (S.D. Miss. 1982). That matter was concluded by judgment of December 3, 1982, which incorporated by reference "the terms of a Stipulation for Settlement" of even date, and quieted title to Horn and Ship Islands in plaintiff United States of America. It is understood that the Stipulation for Settlement thus referred to included provision payment by the United States of substantial sums to various parties claimant.

These payments were made in satisfaction of various claims based on titled traced to the State of Mississippi and/or to rights of occupancy under the Color of Title Act, 43 U.S.C. § 1068. For background, see *Arthur Baker et al., Skrmetti Realty Co.*, 64 Interior Decisions 82 (1957). In *Adams, supra*, plaintiff United States had expressly contended, in Part II of its motion for summary judgment: "THERE WERE NO FOREIGN LAND GRANTS EVER ISSUED ON THE SUBJECT LANDS." Plaintiff's Memorandum in Support of Its Motion for Summary Judgment, p. 6. As the parties asserting proprietary interests in Horn Island were unable to controvert this bald assertion, the "Stipulation for Settlement" of December 3, 1982, did not reflect payments in settlement of claims founded on grants by former sovereigns.

In the meantime, diligent efforts by James R. Beggerley (a claimant to various lots on Horn Island, and a participant in the above-mentioned proceedings) have led to the discovery of evidence documentary of a grant (or concession) dated August 1, 1781, by Bernardo de Galvez (at that time the Governor General, Intendant, and Inspector General of Spanish Luisiana) to Catarina Boudreau. In terms and as further illustrated by the sketch of survey incorporated therein by reference, it encompasses the whole of Horn Island. An English translation of this grant (or concession) is found in Volume 203, Land Claims East of the Pearl River, Evidence Book B, Item 126 (National Archives, Washington, D.C.). As received and archived originally, it was part of the record documentary of the first Report of the Land Commissioners East and West of the Pearl River, on Private Land Claims, of January 5, 1816.

That report is reproduced in 3 American State Papers, Public Lands 7 *et seq.* (1834). The claim of the "Heirs of Catherine Boudreau" which appears there as Item 51 on p. 15, describes the property as being "6 leagues in length, with various widths," situated in the "Gulf of Mexico," but does not identify it as Horn Island. Such identification was possible only by a search of the records compiled by the Land Commissioners East and West of the Pearl River appointed pursuant to Act of Congress of April 25, 1812, 2 Stat. 713 (ch. 67).

An enactment of even date, 2 Stat. 716 (ch. 68) had created the General Land Office as a bureau of the Treasury Department. For that reason, the Reports of the Land Commissioners East and West of the Pearl River, dated January 5, 1816, were addressed by them to the Secretary of the Treasury, and submitted by the latter to Congress for further action. See Sec. 1 of the Act of March 3, 1819, 3 Stat. 528. Exactly three decades thereafter, the Act "to establish the Home Department" (the Department of the Interior) provided that "the Secretary of the Interior shall perform all the duties in relation to the General Land Office, of supervision and appeal, now discharged by the Secretary of the Treasury." Act of March 3, 1849, 9 Stat. 395, sec. 3. By Presidential Reorganization Plan No. 2 of July 16, 1946, the General Land Office and the Grazing Service of the Department of the Interior were consolidated into the Bureau of Land Management. M. Clawson, *The Bureau of Land Management* 38 (1971). It follows that the Secretary of the Interior (the official in charge of establishing the Gulf Islands National Seashore) was at the time of the above-mentioned proceedings to quiet title to

Horn Island in charge of the very same federal government entity which had received, reported on, and archived a Spanish land grant (or concession) to that island.

Thus, plaintiff's assertion in the proceedings to quiet title in Horn Island that "THERE WERE NO FOREIGN LAND GRANTS EVER ISSUED ON THE SUBJECT LANDS" was a misrepresentation (negligent or at best innocent) by or on behalf of a party in direct functional and institutional control of documentary evidence to the contrary. If the grant (or concession) of Horn Island to Catarina Boudreau by Governor Galvez on August 1, 1781, was effective under the pertinent law prevailing at the relevant time and place, it seems highly likely, therefore, that the "Stipulation and Settlement" incorporated by reference in the judgment of December 3, 1982 is vitiated by a material mistake induced by the Plaintiff, which alone had official and institutional memory of (and access to) the truth.

Issues

The present memorandum has been prepared at the request of Ernest G. Taylor, Esq., of the Jackson, Mississippi bar, counsel to James R. Beggerley. Mr. Beggerley was a party to *United States v. Adams et al., supra*, and to the Stipulation and Settlement of December 3, 1982, incorporated by reference into the judgment of the United States District Court for the Southern District of Mississippi of even date, quieting title to Horn Island in the United States.

In those proceedings, Mr. Beggerley had asserted title to part of Horn Island by virtue of purchases by his father, Clark M. Beggerley, Sr., of various lots in

Federal Survey Township 9 South, Range 6 West, at a sale of these properties for delinquent taxes, held by the Sheriff and Tax Collector of Jackson County, Mississippi, at the court house of that county in Pascagoula on April 3, 1950. These lots are located on Horn Island, which as platted in 1847 encompasses parts of Township 9 South, Ranges 6, 7, and 8 of the Mississippi federal survey.

Mr. Beggerley's assertion of title to portions of Horn Island was thus based not on a grant by a former sovereign or by the United States, but on a purchase of lands seized and sold for tax deficiency by the State of Mississippi. This sale was valid only if these lands were not at the time of the sale public lands of the United States. That is so because by virtue of an irrevocable condition accepted by Mississippi as a precondition of admission to the United States as a State on equal footing, a convention of the people of Mississippi Territory Mississippi had "agree(d) and declare(d) that they for ever disclaim all right or title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States;" and "that no taxes shall be imposed on lands the property of the United States." Act of March 1, 1817, Sec. 4, 3 Stat. 348, 349.

Section 2 of that enactment, *id.* 348, had defined the territory of the State of Mississippi as "including all the islands within six leagues of the shores" of that State, thus encompassing Horn Island. To the extent that Horn Island consisted of "waste and unappropriated lands" of the United States at the date of Mississippi's incorporation into the Union on December 10, 1817 (3 Stat. 472), however, such lands remained part

of the public domain of the United States. The "waste and unappropriated lands" of the United States within the boundaries of the State of Mississippi could not even be taxed, nor yet sold, by that State.

In its action to quiet title in Horn Island, the United States was able to establish, through production of the appropriate Tract Book entries, that since the filing of the federal survey plat encompassing Horn Island, no land on that island had been granted out of the sovereignty of the United States. That proof relates back to the acquisition of sovereignty over Horn Island by the United States, for as the Supreme Court of the United States said, in *Buxton v. Traver*, 130 U.S. 232, 235 (1889): "No portion of the public domain, unless it be in special cases not affecting the general rule, is open to sale until it has been surveyed and an approved plat of the township embracing the land has been returned to the local land office."

On the other hand, if (and to the extent that) Horn Island was not part of the public domain of the prior sovereign when the United States obtained sovereignty of the soil by cession and/or state succession, such lands did not become part of the public domain of the United States. In that alternative, they were fully subject to the law of the State of Mississippi as that law stood from time to time, with the result that the validity of the titles acquired by Mr. Beggerley's father at the Jackson County tax sale on April 3, 1950, falls to be determined solely by Mississippi state law.

At the time of the pendency and the settlement of the action by the United States to quiet title to Horn Island, Mr. Beggerley had no knowledge of the grant (or concession) of that island by Governor Galvez to

Catarina Boudreau of August 1, 1781. He thus had no opportunity to demonstrate

(1) that this grant (or concession) operated under the pertinent law in effect at the relevant time and place, to sever Horn Island from the public domain of that sovereign, and

(2) that Horn Island not revert, prior to the acquisition of sovereignty of the soil by the United States, to the public domain of a prior sovereign from whom the United States claims title through cession and/or state succession.

These are the two issues to be discussed in the present memorandum.

I

THE WEST FLORIDA CESSION

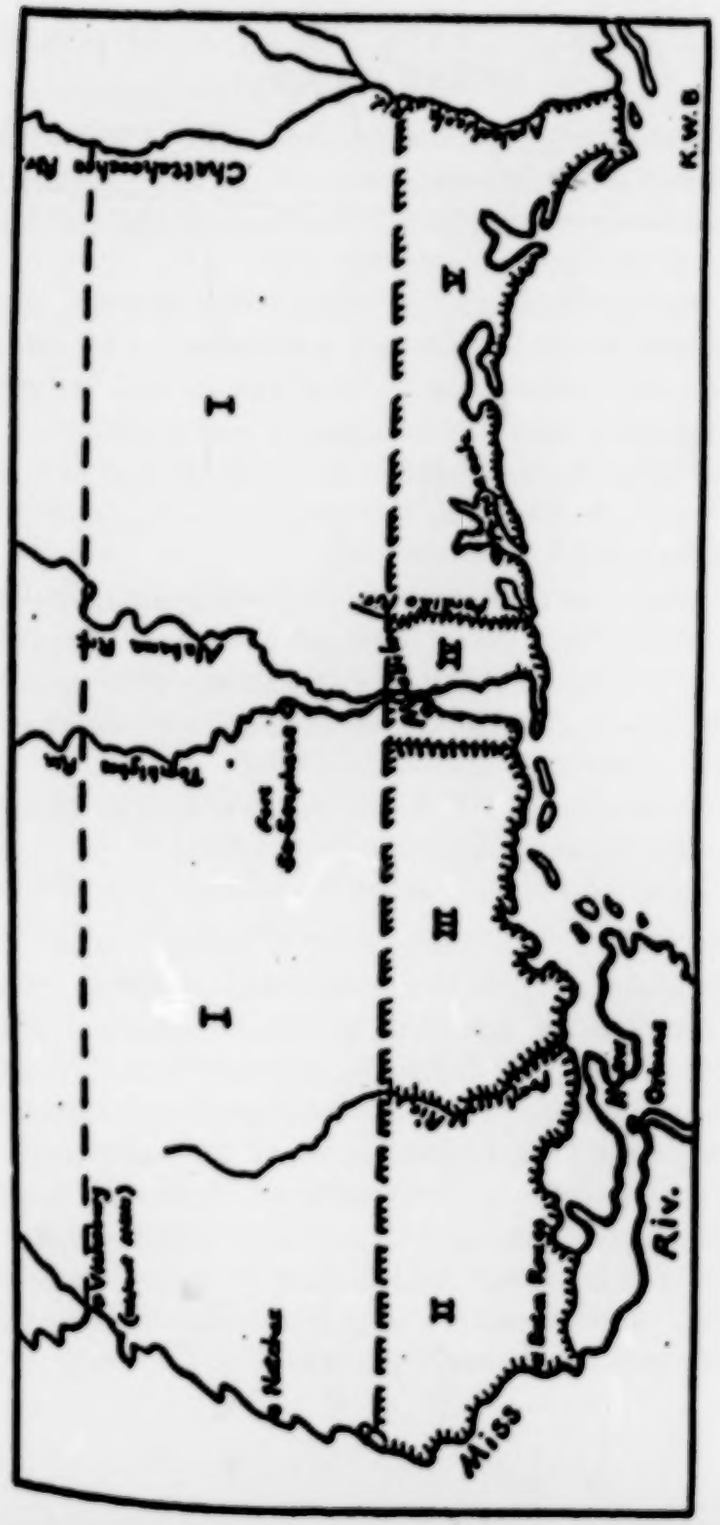
1. Background and Chronology

No other area of the continental United States has attracted as vast an array of public land-related questions as the area between the Pearl and Perdido Rivers south of the Thirty-First parallel, *i.e.*, the coastal region of the present States of Mississippi and Alabama. This area was occupied (and at times fought over) by no less than three sovereigns other than the United States: France, Great Britain, and Spain. In the first two decades of the nineteenth century, it was claimed by the United States but held, in whole or in part, by Spain. Only when Spain ceded "West Florida" along with "East Florida" (= present-day Florida) to the United States by the Treaty of Amity, Settlement, and Limits of February 22, 1819, 8 Stat. 252, did sovereignty to these lands cease to be in dispute. The following map, taken from the authorita-

tive account of I.J. Cox, *The West Florida Controversy, 1798-1813* after p. 2 (1918; reprint 1967) illustrates the geographic and temporal dimensions of conflicting claims of sovereignty over this area.

[Following]

MAP TO ILLUSTRATE THE ACQUISITION OF WEST FLORIDA



[Following]

MAP TO ILLUSTRATE THE ACQUISITION OF WEST FLORIDA

I. Territory added to the original jurisdiction of West Florida by
1767 Great Britain in [redacted]; in dispute between Spain and the United States, 1783-1795; relinquished by Spain in the Treaty of 1795 and definitely occupied by the United States in 1798.

II. Territory claimed by the United States, 1803-1810, as part of the Louisiana Purchase; proclaimed independent by its inhabitants, September, 1810, and occupied by the United States in the following December; incorporated with the State of Louisiana in 1812.

III. Claimed by the United States as above; brought under its military and civil jurisdiction in 1811; incorporated with Mississippi Territory in 1812.

IV. Claimed by the United States as above; American jurisdiction proclaimed there by Claiborne (1811) and by Holmes (1812), except in the town of Mobile; occupied by the military forces of the United States, April, 1813, and the civil jurisdiction of Mississippi established there; later part of Alabama.

V. Invaded by Jackson, in 1814 and 1818; ceded by Spain to the United States in the Treaty of 1819; part of Florida.

Sovereignty of Spain over Florida (later "East Florida") dates from the sixteenth century. French settlement along the Gulf of Mexico started about a century thereafter, and the French settlements at Biloxi and Mobile preceded those at New Orleans and Natchitoches but formed part of French Louisiana along with them. The eastern boundary between French Louisiana and Spanish Florida until the events of the French and Indian War lay somewhere between Mobile and Pensacola, the former being French, and the latter, Spanish.

Two major changes of sovereignty occurred as a result of the defeat of France and Spain in the French and Indian War. First, pursuant to the Treaty of Peace between these three countries, signed at Paris on February 10, 1763, "Florida, with Fort St. Augustine, and the Bay of Pensacola" was ceded by Spain to Great Britain. Secondly, by article 7 of the same treaty, the King of France ceded to Great Britain "the river and port of the Mobile, and every thing which he possesses, or ought to possess, on the left side of the river Mississippi, except the town of New Orleans and the island in which it is situated, which shall remain to France." C. Parry, ed. 42 Consolidated Treaty Searies (U.K.) 331 & 226. Thus, sovereignty of the area between the Pearl and Perdido Rivers passed to Great Britain along with all of Spanish Florida. A third change of sovereignty occurred immediately to the west of this area as a result of these cessions: in fulfillment of its obligations under the Bourbon family compact, France ceded the remaining parts of French Louisiana to Spain. For details, see Baade, "Marriage Contracts in French and Spanish Louisiana: A Study in Notarial Jurisprudence," 53 *Tulane L. Rev.* 1, 30-31 (1978).

Great Britain took possession of Pensacola in August, 1763, and of Mobile on October 20 of that year. By Royal Proclamation of October 7, 1763, British Florida was divided into the colonies of East and West Florida, divided by the Appalachicola River. Robert L. Gould, *Borderland Empires in Transition, The Triple-Nation Transfer of Florida* 103, 112-13 & 118-19. Thus, the entire Gulf Coast area here described became part of the colony of West Florida under British rule. This included Horn Island, since the

Royal Proclamation of October 7, 1763, defined West Florida so as to "includ(e) all Islands within Six Leagues of the Coast." Gould at 119.

The next changes in sovereignty occurred in and after the American Revolutionary War, which found the rebellious thirteen Atlantic seaboard colonies (excluding the Floridas) in actual military alliance with France and tacit military alliance with Spain. Spanish military activities along the Gulf coast are especially important in this connection, for the Spanish forces were commanded in person by Governor General Bernardo de Galvez of Luisiana. On March 14, 1780, Galvez captured Mobile. Some fourteen months later, as the result of an amphibious operation launched from Cuba in October, 1780, he captured Pensacola. By the articles of surrender signed by General Campbell at Pensacola on May 10, 1781, the British forces surrendered the entire colony of West Florida to Spain. J. Barton Starr, *Tories, Dons, and Rebels, the American Revolution in British West Florida* 173-74, 210-211 (1976).

This surrender was formalized by the Preliminary Treaty between Great Britain and Spain, signed at Versailles on January 25, 1783. Article 3 of the French (authentic) text of that treaty provided: "Sa Majesté Britannique cedera á sa Majesté Catholique la Florida Orientale, et sa ditte Majesté Catholique conservera la Floride Occidentale." C. Parry, Ed. 48 Consolidated Treaty Series 251. Thus, Spain was "ceded" East Florida but "kept" West Florida, which was already in Spanish possession by virtue of General Campbell's surrender of that colony at Pensacola on May 10, 1781. (This dispels doubt as to the propriety of land grants (or concessions) by Spanish authorities in West Florida in August of that year.)

The division of East and West Florida into two provinces was maintained under Spanish rule. Corbitt, "The Administrative System" *supra*, at 54 *et seq.* It appears from documents published in the authoritative work of Joseph M. White, *A New Collection of Laws, Charters and Local Ordinances of the Governments of Great Britain, France and Spain, relating to the Concessions of Land in Their Respective Colonies* (1839) (= *White's Recopilacion*) that a Spanish governor of West Florida was appointed in May, 1781, 2 *White's Recopilacion* 255, but that the post commandants at Mobile and Pensacola remained immediately subject to the Governor of Spanish Luisiana, 2 *id.* 454 (Governor General Miro's commission); 455, 455 (Governor General Baron de Corondelet's commission). The authority of Governor General Galvez to "govern" Mobile was spelled out in a royal Order of February 12, 1781, quoted in English translation by Corbitt, *infra* at 42. It is also established that until the Intendancy Ordiance of 1798 was put into effect locally, the Governors of Spanish Luisiana had power to make, and did make, land grants in West Florida under the rules governing the making of lands grants in Spanish Luisiana. 2 *White's Recopilacion* 338, 339 (Report of Surveyor General Pintado); *Murdock v. Gurley* 5 Rob. (La.) 457, 466 (1843).

The most detailed account of the Mobile region under Spanish rule is contained in Peter J. Hamilton, *Colonial Mobile, An Historical Study, largely from Original Sources, of the Alabama-Tombigbee Basin from the Discovery of Mobile Bay in 1519 until the Demolition of Fort Charlotte in 1821* (1897). Its

author was a lawyer, and had been City Attorney of Mobile. More recently, Jack D. L. Holmes (a leading authority on Spanish settlement in what is now Alabama and Mississippi) has reported on "Alabama's Forgotten Settler: Notes on the Spanish Mobile District, 1780-1813," 33 *Alabama Hist. Q.* 87 (1971). Peter Zahendra, *Spanish West Florida, 1781-1821* (Ph.D. dissertation, University of Michigan 1976, unpublished) marshals the pertinent sources. D. C. Corbitt, "The Administrative System in the Floridas, 1781-1821," 1 *Tequesta* (no. 2) 41 (August, 1942) is still indispensable.

Hamilton's extensive discussion of land transactions in Mobile (unfortunately limited to land in present-day Alabama) is based on Spanish-era documents contained in two "heavy cypress boxes" then stored in the Mobile Probate Court, made "accessible to the public" by two manuscript volumes of Translated Records, completed in 1840 by Joseph E. Caro under a commission from Governor Bagby of Alabama pursuant to an act of the legislature of that State, dated January 9, 1833. Hamilton 262. It also appears that Pascagoula was "long dependent on the Mobile parish," *id.* 156, and the districts of the Post Commandants under Spanish rule generally followed the parish boundaries of Roman Catholic churches. Henrique Grimarest is mentioned as Commandant of the Mobile District by Hamilton at 262 *et seq.*, and in numerous official sources mentioned further below.

It should also be mentioned that pursuant to article 5 of the definitive treaty of peace between Spain and Great Britain, of September 3, 1783, C. Parry, Ed., 48 Consolidated Treaty Series 481, 482, British subjects resident in West Florida were given eighteen months

from the exchange of ratifications to "sell their estates and remove their effects," which period could be extended if that time was insufficient because of the value of the estate to be disposed. Thus, British land rights in West Florida were not confirmed but expected to terminate. After 1785, it became possible to secure confirmation of such grants from the Governor of Spanish Luisiana on condition of taking an oath of loyalty to Spain, see *Murdock v. Gurley*, 5 Rob. (La.) at 458-60, but subject to that exception, previously British-held lands in West Florida were treated as part of the Spanish royal domain, available for grant (or concession) by the Governor of Spanish Luisiana.

2. The West Florida Controversy

The United States, which came into existence in and by virtue of the War of the American Revolution, does not figure in the developments outlined above. Its first official appearance in the "Old Southwest" was in the dispute over the northern boundary of Spanish West Florida, which eventually was established by article 2 of the Treaty of San Lorenzo, of October 27, 1795, at the thirty-first parallel between the Mississippi and Appalachicola Rivers. 8 Stat. 138. The implementation of the treaty first confronted the United States with the problem of verification and confirmation of Spanish as well as British land titles and land claims, and the legislative precedents then set were to be of substantial significance after the Louisiana Purchase. See R. V. Haynes, "The Disposal of Lands in the Mississippi Territory," 24 *J. Miss. Hist.* 226, 233 *et seq.* (1962); H. Coles, "The Confirmation of Foreign Land Titles in Louisiana," 38 *La. Hist. Q.* 1, 3 *et seq.* (1958). Beyond that, the

continuing significance of the Treaty of San Lorenzo of 1795 is that it put beyond doubt the position of Spain as the lawful sovereign of West Florida below the Thirty-First Parallel (which, incidentally, had also been the northern boundary of British West Florida under the Proclamation of 1763).

All this was to change with the Louisiana Purchase of 1803. France, we have seen, had ceded French Louisiana to Spain in 1762. In the Treaty of San Ildefonso, of October 1, 1800, Spain undertook to retrocede (then Spanish) Luisiana to France, and in article 1 of the Louisiana Purchase Treaty of April 30, 1803, France ceded Louisiana to the United States by in effect assigning the San Ildefonso Treaty cession. 8 Stat. 200, 200-201. As there reproduced, that latter treaty had envisaged the cession of "the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, *and that it had when France possessed it*" (emphasis added). Since the Mobile District had been part of French Louisiana, the United States claimed that it was included in the Louisiana Purchase. As that district had never been part of Spanish Luisiana, Spain took the opposite view.

The Louisiana Purchase territory was transferred by Spain to France on November 30, 1803, and by France to the United States on December 20, 1803. Soon thereafter, the United States laid claim to the Mobile District. Ostensibly to suppress lawlessness but mainly so as to bolster its claim to that part of the area, the United States occupied Pascagoula in Summer 1811, and Mobile itself was surrendered under protest by the Spanish authorities on April 13, 1813. I. J. Cox, *The West Florida Controversy, 1798-1813* at

584-619 (1918; reprint 1967). The legal consequences of the assertion of United States sovereignty over French Louisiana in its original dimensions were first spelled out in section 14 of the Act of April 30, 1804 "erecting Louisiana into two territories and providing for the temporary government thereof," 2 Stat. 283, 287-89. It provided, in pertinent part:

> That all grants for lands within the territories ceded by the French republic to the United States, by the treaty of the thirtieth of April, in the year one thousand eight hundred and three, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining any grant, title or claim, to such lands, and under whatsoever authority transacted, or pretended, be, and the same are hereby, declared to be, and to have been from the beginning, null, void, and of no effect in law or equity: *Provided, nevertheless*, That any thing in this section contained shall not be construed to make null and void any bona fide grant, made agreeably to the laws, usages, and customs, of the Spanish government, to an actual settler on the land so granted, for himself, and for his wife, and family; or to make null and void any bona fide act or proceeding done by an actual settler, agreeably to the laws, usages, and customs, of the Spanish government, to obtain a grant for the lands actually settled on by the person or persons claiming title thereto, if such settlement, in either case, was actually made prior to the twentieth day of December, one thousand eight hundred and three: *And provided, fur-*

ther, That such grant shall not secure to the grantee, or his assigns, more than one mile square of land, together with such other and further quantity as heretofore hath been allowed for the wife and family of such actual settler, agreeably to the laws, usages and customs, of the Spanish government.

This provision laid down three of the four rules which (alone or in combination) were to govern United States recognition of Spanish land titles in Louisiana and in Mississippi and Alabama below the Thirty-First Parallel. First, the United States did not recognize, as of right, *any* land grant or concession emanating from a foreign country as to lands over which the United States claimed sovereignty at the time of such grant or concession, even if the granting State was in actual possession of the land at that time and the United States was not. Secondly, the United States undertook to recognize, nevertheless, not only *bona fide* grants, but even *bona fide* land claims, valid under the "laws, usages, and customs of the Spanish government," provided only that they were made to *actual* settlers. Thirdly and finally, such grants and claims to *actual settlers* were to be recognized only to the extent that they did not exceed *acreage limitations imposed by United States law*.

These three rules have to be viewed in contrast to a fourth one, which forms the background of United States public land law in territories acquired by treaty in and since the Louisiana Purchase. Eighteenth-century Spain (an enlightened but nevertheless an absolute monarchy ruled by His Most Catholic Majesty) did not tolerate heretics on Spanish soil, and therefore did not guarantee the property rights of British subjects after the 1781-83 cession beyond a short period of grace for disposal and removal. See *supra* p. 7 [131-132], and for subsequent developments under Spanish rule, G. Din, "The Immigration Policy of Governor Esteban Mirõ in Spanish Louisiana," 73 *S.W. Hist Q.* 155, 156-65 (1969).

In sharp contrast thereto, the United States (a secular republic) routinely guaranteed pre-existing property rights in the cession area when acquiring territory by treaty of cession. Therefore, the rule that the United States did not recognize land grants by a foreign state not recognized as the lawful sovereign *in loco* at the time of the grant was really an exception to the more general rule that the United States *did* recognize the continued validity of land grants by a former sovereign while in lawful possession of land subsequently ceded to the United States.

3. Congressional Action on Spanish Grants and Claims

This rule was first spelled out in the Louisiana Purchase Treaty of 1803. By articles 2 and 3 of that treaty, France ceded to the United States the cession "territory with all its rights and appurtenances," further defined to include "adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property." Article 4 went on to provide that the inhabitants of the ceded territory were to be "maintained and protected in the free enjoyment of their liberty, property, and the religion which they process." 8 Stat. 201, 202. Thus, the public lands of the Louisiana Cession

passed to the United States; the private lands remained private.

Given the adamant position of the United States that the Louisiana Cession included the Mobile District, logical consistency would seemingly have called for the adoption of a system of land rights verification and validation based on article 4 of the Louisiana Cession Treaty. Logic, however, had to yield to the hard fact that Spain was in control at Pascagoula until the summer of 1811 and at Mobile until April 13, 1813, and that any definitive resolution of matters relating to the validity of land titles in that area would remain impossible until the resolution of the West Florida dispute between Spain and the United States. In any event, when Congress adopted the "Act for ascertaining the titles and claims to lands in that part of Louisiana which lies east of the river Mississippi and island of New Orleans" of April 25, 1812, 2 Stat. 713, it made no reference, direct or indirect, to article 4 of the Louisiana Cession Treaty.

As indicated by its caption, the act of August 25, 1812, set forth a scheme for "ascertaining" both "titles" and "claims" to lands in West Florida. The area between the Mississippi River and New Orleans to the West and the Perdido River to the East was divided into two districts, separated by the Pearl River (later the boundary between the States of Louisiana and Mississippi). A commissioner was to be appointed for the lands east [sic] of the Pearl (later to be known colloquially as the "West Florida parishes" of Louisiana), and another one for the lands between the Pearl and the Perdido, now corresponding to the coastal areas of the States of Mississippi

and Alabama-south of the Thirty-First Parallel (Sec. 1).

With the aid of a clerk "capable of translating the French and the Spanish language," these two commissioners were to receive "evidences of titles and claims to lands" within their respective districts (sec. 2), but the word "title" disappears thereafter, to be swallowed up by "claim," employed comprehensively to cover "any grant, order of survey, or other evidence of claim whatsoever, derived from the French, British, or Spanish governments." (sec. 3). The commissioners were directed to inquire into the "justice and validity" of claims (including we see "claims" based on grants), and charged with the duty "to ascertain, in every case, whether the lands claimed have been inhabited and cultivated; at what time such inhabitation and cultivation commenced; when surveyed, and by whom and what authority; and into every other matter respecting the claims which may affect the justice and validity thereof." (Sec. 5). They were to prepare "abstracts from the records of the claims filed as aforesaid, in which the claims shall be arranged into classes, according to their respective merits, and other circumstances whereby they may be diversified," and these abstracts as thus reported were to be "laid before congress" by the Secretary of the Treasury "for their determination thereon" (sec. 7). Additionally, the commissioners were directed "to collect and report to congress, at their next session, a list of all the actual settlers on land in said districts, respectively, who have no claims to land derived either from the French, British, or Spanish, governments, and the time at which such settlements were made" (sec. 8).

Thus, the original federal legislative scheme for ascertaining French-, British- and Spanish-derived entitlements to lands in the Mobile District was cast entirely in terms of claims rather than rights, to be "determin(ed)" by Congress "according to their respective merits," with special emphasis on the time and length of inhabitation and cultivation. This scheme is reflected faithfully in the Reports of the Land Commissioners East and West of the Pearl River, on Private Land Claims, of January 5, 1816, subsequently published in American States Papers, 3 public Lands 6 et seq.

The first of these reports, by William Crawford, Commissioner for the District east of the Pearl River, contains registers of twelve different categories of claims, starting with 17 modest town lot-size grants ranging from 150 to 1,600 arpens, "founded on complete grants from the French, British, or Spanish Governments, which claims are, in the opinion of the Commissioner (east of the Pearl River) valid, agreeable to the laws, usages, or customs of said Governments." These are listed *id.* at p. 7.

The sixth category comprises 111 "claims, of various dimensions; which claims ought *not* in the opinion of the said Commissioner, to be confirmed." These are listed *id.* at 14-17. The claim of the Heirs of C. Boudreau, in right of Catalina Boudreau based on a "Spanish concession," appears there on p. 15 under no. 51. It is described as being "6 leagues in length, with various widths," situated in the Gulf of Mexico, and issued by Galvez. There is no entry as to who made the survey, but only an entry, printed across three columns, headed

When By Whom Cultivation

"Cattle have been generally kept upon the island, and formerly negros attended them, but not inhabited or cultivated."

This list of 111 claims is followed by an entry reading: "Remarks on the preceding claims.—The preceding claims are forfeited—most of them under the Spanish law, for want of inhabitation and cultivation; and do not appear to be entitled to confirmation under any law of the United States. A few are derived from officers who had no right to grant, or, at most, not on so extensive a scale." *Id.* 17. Virtually all of these 111 claims are listed as "not inhabited or cultivated"—presumably as of the date of the report.

Congressional response to this report is reflected in the Act of March 3, 1819, "for adjusting the claims to land, and establishing land offices, in the districts east of the island of New Orleans," 3 Stat. 598. Section 1 there, so far as here material, recognized "as valid and complete titles against any claim on the part of the United States, or right derived from the United States," all "claims" to land "founded on complete grants from the Spanish government," found by the Commissioners to have been "valid, agreeably to (Spanish) laws, usages, and customs." Claims "founded on any order of survey, requette, permission to settle, or any written evidence of claim" were, if recommended by the Commissioners for approval and if "cultivated and inhabited," confirmed "in the same manner as if title had been completed," but only for quantities up to 1,280 acres unless surveyed under Spanish authority before April 15, 1813 (sec. 2). Claims by actual settlers unsupported by written

evidence were to be rewarded by "donation(s)" of up to 640 acres, but only if the land had been "actually settled or inhabited" (sec. 3).

Neither the Act of March 3, 1819 nor its subsequent amendments dealt with the fate of grants and claims received and recorded by the Commissioners but not recommended for confirmation. This was so, we may assume safely, because that matter had been covered by the Treaty of Amity, Settlement, and Limits with Spain, 8 Stat. 252, signed in Washington on February 22, 1819 and assented to by the Senate two days thereafter—exactly one week before the adoption of the Act of March 3. That treaty, however, was still awaiting ratification by Spain, and did not become effective until almost exactly two years thereafter (February 22, 1821). See Hunter Miller, Ed., 3 *Treaties and Other International Acts of the United States* 3 (1933). Its statutory implementation was to take another seven years.

Congressional recognition of Spanish land titles in West Florida did not resolve disputes even as to Spanish land grants expressly recognized, for as already mentioned, the United States thereby merely renounced *its* claim to such lands as part of the public domain, leaving the resolution of conflicting claims to private adjudication. Since most of the grants recognized were town lots in Mobile (many of them with wharfage), and since Mobile under United States government and the rule of "King Cotton" quickly became a port ranking in importance only after New York and New Orleans, title to these lots was bitterly contested.

A comprehensive account of this litigation is provided by E. W. Faith, "Grant Law Suits Affecting

Mobile," 1 *Ala. Lawyer* 320, 329-42 and Appendix, at 345, listing 18 "Cases Covering River Front" (1940). The "most celebrated" of these cases is of course *Pollard v. Hagan*, U.S. (7 How.) 219 (1844), familiar to counsel through recent involvement in *Cinque Bambini Partnership v. State*, 491 S.2d 508 (Miss. 1986), aff'd sub nom. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). *Pollard* undercut the validity even of titles to tidal lands expressly confirmed by Congress after Alabama statehood.

We are concerned here, however, with a grant (or concession) filed with the Commissioner for the district East of the Pearl River but not recommended by him for confirmation by Congress and, in the event, not confirmed expressly by act of Congress. The law governing the continued validity of such titles after the change of sovereignty is found in the 1819 Treaty of Amity, Settlement, and Limits, as construed judicially (and for our purposes, authoritatively) by the Supreme Court of the United States.

4. Treaty Jurisprudence

Article 2 of the Treaty of Amity, Settlement, and Limits between Spain and the United States reads as follows:

> His Catholic Majesty ceded to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida. The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other buildings, which are not private property, archives and documents, which

relate directly to the property and sovereignty of said provinces, are included in this article. The said archives and documents shall be left in possession of the commissaries or officers of the United States, duly authorized to receive them. 8 Stat. at 254.

Thus, East and West Florida (including adjacent islands) were ceded by Spain to the United States, but that cession did not as such transfer the ownership of "private property" in the cession area. The continued efficancy of Spanish-derived private rights thus implied was spelled out more fully in article 8, providing, in its English version:

> All the grants of land made before the 24th day of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty; in default of which, the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of his Catholic Majesty, for the cession of the Florida, was made, are hereby declared, and agreed to be, null and void. 8 Stat. at 258.

This text is, however, different from the (equally authentic) Spanish texts in some respects, to assume crucial importance soon thereafter. The Spanish text of article 8 of the 1819 Treaty with Spain reads as follows:

> Todas las concesiónes de terreños hechas por S. M. C. A. o por sus legitimas autoridades antes del 24 de Enero, de 1818, en los expresados territorios que S. M. cede á las personas que esten en posesion de ellas, del mismo modo que lo serian si S. M. hubiese continuado en el dominminio de estos territorios; pero los propietarios que por un efecto de las circumstancias en que se ha hallado la Nacion Española y por las revoluciones de Europa, no hubiesen podido llenar todas las obligaciones de las concesiónes, seran obligados á cumplirlas segun las condiciones de sus respectivas concesiónes, desde la fecha de este Tratado, en defecto de lo qual seran nulas y de ningun valor. Todas las concesiónes posteriores al 24 de Enero de 1818, en que fueron hechas las primeras proposiciónes de parte de S. M. C. A. para la cesión de las dos Floridas, convienen y declaran las dos altas partes contratantes que quedán anuladas y de ningun valor.

It will be seen that the Spanish version of this article makes the validity of grants (or concessions) such as the one here involved a virtual certainty. Not only did it expressly encompass *concessions* (*concesiónes*), but it also provided that all concessions made by Spanish authorities in the cession area before January 24, 1818 were to *remain* (*quedán*) ratified and confirmed. The English text of article 8, however, referred only to *grants*, and specified that

these "*shall be* ratified and confirmed" (emphasis added), thus suggesting that even the continued validity of "grants" was dependent upon affirmative action of the new territorial sovereign, the United States.

Even more disturbingly, as literally spelled out in article 2, the King of Spain had ceded only those territories "which belong to him" (*i.e.*, which belonged to him at the operative date of the cession). Both the President of the United States and Congress had maintained consistently since 1804 that West Florida between New Orleans island and the Perdido had passed to the United States with, and by virtue of, the Louisiana Purchase Treaty of 1803. It was possible to contend, therefore, that article 8 did not apply at all to Spanish grants (or concessions) in that area if made after the Spanish retro-cession of "Louisiana" to France (October 1, 1800).

Both of these arguments were made in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), where the validity of a land grant made by Spanish authority west of the Pearl River in 1805 was at issue. Chief Justice Marshall's opinion started with an analysis of the territorial claims of the United States to this area. He discussed these with little if any approval, *id.* 305-308, concluding nevertheless that the judiciary was bound by the position unequivocablly taken by the political departments of government. Essentially for the same reason, he construed article 2 of the 1819 Treaty to involve the cession of only those parts of the Floridas which, *in the view of Congress and of the President of the United States*, "belong(ed)" to the King of Spain after October 1, 1800. 27 U.S. (2 Pet.) at 310-311.

Chief Justice Marshall went on, nevertheless, to discuss article 8 of the 1819 Treaty. Relying exclusively on its English version, he wrote:

> The article under consideration does not declare that all the grants made by his Catholic majesty before the 24th of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of Congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, etc. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject. *Id.* at 314-15.

Since the grant there involved had not been confirmed by or pursuant to legislation implementing article 8 of the 1819 Treaty, it was held to be of no legal effect. *Id.* at 315-16.

Four years later, in *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), Chief Justice Marshall had the opportunity to re-examine the question whether article 8 of the 1819 treaty was directly applicable ("self-executing," in today's parlance) by virtue of the Supremacy Clause of the United States Constitution, or whether it applied as domestic law only as and when implemented by acts of Congress. This time, the argument for direct applicability was presented

by Joseph M. White, the leader of the Spanish Florida claims bar and the author of *White's Recopilacion.* The United States was represented by Roger Taney, Attorney-General at the time. Mr. White's arguments are summarized 32 U.S. (7 Pet.) at 62-81. Not unexpectedly, he pointed out the difference in wording between the English and Spanish versions of article 8, urging the adoption of a construction in line with the Spanish version. *Id.* at 68-70.

This argument proved successful in good measure because Mr. White advanced it immediately after having invoked a more general principle of justice. "What indeed (he asked rhetorically) can be more clearly entitled to rank among things favourable than engagements between nations securing the private property of faithful subjects, honestly acquired under a government which is on the eve of relinquishing their allegiance, and confided to the pledged protection of that country which is about to receive them as citizens?" *Id.* at 68. That appeal was to strike a responsive chord. The eighth article of the 1819 Treaty, Chief Justice Marshall underlined, "contains stipulations respecting the titles to lands in the ceded territory." In words frequently quoted thereafter and still familiar to international lawyers today, he then continued:

> It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved: but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. *Id.* at 86-87.

The cession of a territory "by its name and from one sovereign to another," he continued, "conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property." After pointing out that this principle was reflected in article 2 of the Treaty which had exempted "private property" from the cession, Chief Justice turned to the question (answered in the negative in *Foster* four years earlier) whether article 8 of the 1819 Treaty was self-executing. Once again, he referred to general international law:

> This article is apparently introduced on the part of Spain, and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security

further than its positive words require, would seem to be admissible. Without it, the titles of individuals would remain as valid under the new government as they were under the old; and those titles, so far at least as they were consummate, might be asserted in the courts of the United States, independently of this article. *Id.* at 88.

Chief Justice Marshall then continued:

> The treaty was drawn up in the Spanish as well as in the English language. Both are originals and were unquestionably intended by the parties to be identical. The Spanish has been translated, and we now understand that the article, as expressed in that language, is, that the grants "shall remain ratified and confirmed to the persons in possession of them, to the same extent, etc."—thus conforming exactly to the universally received doctrine of the law of nations. If the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail. If, as we think must be admitted, the security of private property was intended by the parties; if this security would have been complete without the article, the United States could have no motive for insisting on the interposition of government in order to give validity to titles which, according to the usages of the civilized world, were already valid. No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. *Id.* at 88-89.

In consequence, *Foster v. Neilson*, *supra*, was overruled on this point, and article 8 of the 1819 Treaty

was held to be directly applicable or, in present-day terms, self-executing. 32 U.S. (7 Pet.) at 89.

Since Juan Percheman's Spanish grant (or concession) was dated December 12, 1815 when Spain was uncontestedly the territorial sovereign of East Florida, there was no need to reconsider *Foster* more generally. There was, however, another point to be disposed of. Percheman had previously submitted his claim to the commissioners "for ascertaining claims and titles to lands within the territory of Florida" appointed under the Act of May 8, 1822, 3 Stat. 709, and these commissioners had *rejected* his claim. It was therefore contended by the United States that Percheman's claim had been "finally acted upon", (*i.e.*, denied), so that it could no longer be asserted judicially. 32 U.S. (7 Pet.) at 85-86. This contention seemed, at first glance, not implausible. Unlike the land commissioners east and west of the Pearl River appointed under the Act of April 25, 1812, 2 Stat. 713, who could only make recommendations to be "laid before Congress . . . for their determination thereon," the Florida commissioners had statutory authority to "give confirmation" to claims deemed by them to be valid under Spanish law. Act of May 8, 1822, Sec. 5, 3 Stat. at 717-18.

That quasi-judicial power of confirmation was limited, however, to claims involving not more than one thousand acres. In all other respects, the Act of May 8, 1822, followed the legislative precedent of the 1812 enactment summarized further above (pp. [137-140]). As pointed out by Chief Justice Marshall:

> It would seem from the title of the act, and from this declaratory section, that the object for which these commissioners were appointed, was the

> ascertainment of these claims and titles. That they constituted a board of inquiry, not a court exercising judicial power and deciding finally on titles. . . . . These commissioners seem to have been appointed for the special purpose of procuring promptly for congress that information which was required for the immediate operations of the land office. In pursuance of this idea, the second section directs that all the proceedings of the commissioners, the claims admitted, with those rejected, and the reason of their admission and rejection, be recorded in a well bound book, and forwarded to the secretary of the treasury to be submitted to congress. 32 U.S. (7 Pet.) at 90.

"Is it possible," he asked, "that congress could design to submit the validity of titles, which were 'valid under the Spanish government, or by the law of nations,' to the determination of these commissioners?" Even the fifth section of the act, he pointed out, only enabled the commissioners to confirm claims not exceeding one thousand acres. He then continued:

> From this view of the original act, it results, we think, that the object for which this board of commissioners was appointed, was to examine into and report to congress such claims as ought to be confirmed; and their refusal to report a claim for confirmation, whether expressed by the term "rejected," or in any other manner, is not to be considered as a final judicial decision on the claim, binding the title of the party; but as a rejection for the purposes of the act. *Id.* at 91-92.

Thus, *Percheman* laid down two basic rules governing the validity of Spanish land grants (or concessions) in the territories ceded by Spain to the United

States in the Treaty of Amity, Settlement, and Limits. First and foremost, 1819 Spanish grants (in Spanish: *concesiónes*) valid under Spanish law when made were confirmed in their validity by the direct application of principles of international law in conjunction with article 8 of that treaty. Secondly (but not secondarily for present purposes) even the prior rejection of claims based on such grants (or concessions) by land commissioners appointed under United States legislation did not stand in the way of their subsequent *judicial* affirmance on a finding that they were valid under Spanish law.

Percheman did not, however, overrule *Foster v. Neilson* in so far as it had held that under United States law, Spanish grants made west of the Perdido after the conclusion of the Treaty of San Ildefonso (October 1, 1800) were invalid. That point was reargued in *Garcia v. Lee*, 37 U.S. (12 Pet.) 511 (1838), involving a Spanish public land sale in land west of the Pearl River in 1806. The Supreme Court adhered to its prior decision in *Foster* that dispositions of public lands in that are a after October 1, 1800 were invalid. *Id.* at 521-22. *Percheman*, it spelled out, had overruled *Foster* only on the "words of the eighth article of the treaty," holding "that the words used, were words of present confirmation by the treaty, where the land had been rightfully granted before the cession; and that it did not need the aid of an act of congress to ratify and confirm the grant. *This language was, however, applied by the Court, and intended to apply to grants made in a territory which belonged to Spain at the time of the grant.*" 37 U.S. (12 Pet.) at 511 (emphasis supplied).

It is believed that the sentence just emphasized is dispositive of the instant case. Since the Mobile District (and Horn Island) "belonged to Spain [by conquest] at the time of the grant," the validity of the grant (or concession) of that island on August 1, 1781 by Governor General Bernardo de Galvez to Catarina Boudreau is governed by Spanish law applicable in West Florida, as that law stood until the retrocession of "Louisiana" by Spain to France in the Treaty of San Ildefonso on October 1, 1800. If under that law, Horn Island was granted validly in private property, it follows necessarily that this island did not subsequently pass into the public domain of the United States.

That latter consequence, too, is spelled out in the well-known case of *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 717 (1832), where the Court said:

> From a careful examination of the whole legislation of congress on the subject of the Louisiana and Florida treaties, we cannot entertain a doubt that it has from their beginning been intended that the titles to the lands claimed should be settled by the same rules of construction, law and evidence, in all their newly acquired territory. That they have adopted as the basis of all their acts, the principle that the law of the province in which the land is situated is the law which gives efficacy to the grant, and by which it is to be tested, whether it was *property* at the time the treaties took effect.
>
> The United States seem never to have claimed any part of what could be shown by legal evidence and local law to have been severed from the royal domain before their right attached.

Returning to this last point, the Court spelled out once more, *id.* at 735, that "no land which had been severed from the royal domain by antecedent grants, which were valid by the laws of Spain, and created any right of property to the thing granted in the grantees; passed to the United States." To put it more directly: If the grant (or concession) of Horn Island by Governor General Galvez to Mrs. Boudreau in 1781 was valid under Spanish law applicable then and there, Horn Island did not become part of the public lands of the United States when Sovereignty over Horn Island passed to the United States.

Before proceeding to the description and evaluation of that grant, it should be pointed out that "Spanish law" as employed herein in that context refers, of course, not to present-day Spanish law, but to the law of Castile and of the Indies as in force in Spanish North America at the appropriate time and place. That law is no longer in force in Spain itself, and it is applicable today to the case at hand as the law of a former sovereign of what is now part of the United States, *i.e.*, as *domestic* law within the judicial notice of federal courts. See most recently *Summa Corp. v. California ex rel. Lands Comm'n*, 466 U.S. 198, 201-202 note 1 (1984) and cases there cited. It follows that United States Supreme Court cases expounding that law in East and West Florida land grant cases are highly persuasive (if not controlling) authority. I have therefore relied on these authorities when in point and where not manifestly in need of reexamination.

II

THE HORN ISLAND GRANT

1. Description

An English translation of a grant (or concession) by Governor General Bernardo de Galvez to Catarina Boudreau has been located in Volume 203, Land Claims east of the Pearl River, Evidence Book B, in the National Archives, Washington, D.C., where it is designated Item 126. It commences with an undated notice "To the Commissioner of Land Claims East of Pearl River" of a claim by E. Lewis (as agent of the heirs of Catalina Vincenarde Widow Boudreau) to a tract of land called Horn Island in Pascagoula Bay by virtue of a grant from the Spanish government, dated New Orleans August 1781, "as will appear by the grant hereto annexed."

The English translation, presumably of that "grant hereto annexed," starts with an application to the Governor General by John Badida Bodro, dated New Orleans, July 3, 1781, on behalf of "Catarina Bodro, an Inhabitant of Pascagoula." This application recites that when Catarina Bodro was in Mobile, the Governor General had offered to give her Horn Island, and "supplicates" him to grant her that island. This is followed by a short entry dated July 4, 1781, and signed "Galvez," stating that since the applicant was petitioning for land in the "District of Mobile," she was to apply to the Commandant of that place, so that he would be informed and could proceed as provided by law.

The next entry, signed by Henrique Grimarest and dated Mobile, July 21, 1781, states that the island which the claimant solicited, and which was represented "on the annexed plat," consisted of "pasture and trees," and was a "Royal possession." Then follows a sketch of the island, with a note translated from the French. It describes the island as being "about six leagues, or more," in length but of widths varying between one quarter to more than half a league." The passage immediately following in this translation from the French reads as follows: "There was a time, when 10 or 12 English people, worked to form a Company to establish a Cow pen, the present Island, of which W. Grant was one, but that did not take place, and today it only recognized as a property belonging to his Catholic Majesty."

The next entry, which is the last one in Item 126, is dated New Orleans, August 1, 1781. It is signed by Bernardo de Galvez, attested by Andres Armesto, and sealed. It reads as follows:

> Bernard de Galvez, a pensioned Knight of the Royal distinguished Spanish Order of Charles the third, Colonel of the Royal Army, Governor, intendent and Inspector General of this Province of Louisiana.
>
> Having seen the preceding documents (diligencias) executed by Lieut. Colonel Henry Grimarest, Commandant of the Town of Mobile & to the profession which he has given to Catharine Vincenarde, Widow Beaudreaux of the Island commonly called Horn-Island, situated upon the Coast of Mobile running from East to West, containing about six leagues, as exhibited in the accompanying plat. And acknowledging to the conformable to the order of Survey, without causing prejudice to the aforesaid Inhabitants, which

they neither have claimed rather consented as their assistance justifies said operations. Approving of them as we approve of them. USING the authority which the King has conferred to us we grant in his Royal name to the said Catharine Vincenarde, Widow Beaudreaux, the said Horn Island situated upon the aforesaid Coast of Mobile, that as her own she dispose of and enjoy it governing herself by said Documents (diligencias) and conforming to all that is required (lo dispuesto) by the regulation of this [gap] We Give the present signed by our hand, sealed with the Seal of [illegible] and countersigned by the underwritten Secretary for his Majesty's Government in New Orleans 1st August 1781.

As indicated by the first operative sentence of this last entry, and as readily apparent to those familiar with Spanish administrative proceedings, these five entries are part of the same dossier on file, usually called *expediente*, recording proceedings pertinent thereto (*diligencias*) in chronological order. The sequence of proceedings from the initial application through the final action thereon by Galvez followed standard practice by the Governor General of Spanish Luisiana, as shown by the following passage from a report by Juan Ventura Morales, dated New Orleans October 16, 1797 and reproduced in 2 *White's Recopilacion* 472, 474:

> In order to obtain lands from the exchequer, (*fisco,*) the custom is still pursued which prevailed when the French were masters of the country, except in so far as that the government and the intendency acted in concert; and no other form is or has been observed, than the presentation of a

> memorial by the petitioner, praying for a certain number of *arpents*, and designating their location. In virtue of this, the surveyor or commandant of the post, with the assistance of the neighbours, makes the survey; and if not objection be offered, puts the person in possession, and gives him the papers necessary for having his title drawn out: this title is issued upon the strength of these papers, a minute of it being preserved in the office, in order that it may be noted in the book of grants: the sum which is to be paid to the surveyor or commandant, for his trouble, is then delivered or put aside; and the duty of five per cent, for office fees being retained, the petitioner remains in full and quiet possession of the quantity of land which it may please the governor to grant him; I say "which it may please the governor to grant," because, although there be a general rule, by which no person can have more than a certain number of *arpents* granted him, if for agriculture, and half a league in front if for grazing, this rule has not been followed with so much exactness that there have not been some exceptions: and, on the other hand, those who wished to have a larger quantity than the government seemed willing to grant, have not neglected to employ means for arriving at the end, at the expense of their own good faith.

The limitation of the quantity of grants to "half a league in front if for grazing" mentioned in the passage just quoted serves to focus attention on a feature of the Horn Island grant (or concession) that emerges on closer examination. This was clearly a grazing grant. The Post Commandant described Horn Island

as consisting of "Pasture & Trees," and the surveyor's French-language field notes referred to a "Cow pen" which some English people had contemplated setting up on the island.

That was, apparently, a permanent feature, for more than three decades thereafter, Commissioner Crawford reported that "Cattle have been generally kept upon the island, and formerly negros attended them, but not inhabited or cultivated." (*Supra* p. [140]). Although detailed legal evaluation is postponed at this point, it is worth noting here that the standard unit of the cattle grant in Spanish North America was the Spanish league (or *sitio*) of 5,000 varas square (4,428 acres), and frontage limitations did not, of course, apply where a whole island was granted for grazing. Neither was there a tradition of "inhabitation and cultivation" of ranching grants, except perhaps for cattle barons: the normal rancher lived in the *villa* or *pueblo*, ran his cattle on the open range, and corralled, branded and watered them on his spread.

Turning to personalia, we meet familiar figures in familiar places. Bernardo de Galvez was Governor General of Spanish Luisiana from May 8, 1779, to July 30, 1786. 2 *White's Recopilacion* 449. He was indeed in Mobile in 1780 so that Catarina Boudreau could meet him there: he was in personal command of the Spanish forces which captured Mobile on March 14, 1780 (*supra* p. [129]). Between June 23 and August 23, 1781, he signed several instruments in New Orleans, later described as "patent or title" or "title in form," all of which were later deemed to be valid grants by the Registrar of the Land Office at Opelousas in a report of October 1, 1825, reprinted in American State

Papers, 4 Public Lands 490, 492-93 & 506 (1859). Henrique Grimarest was appointed commandant of Mobile Post on March 16, 1780, immediately after the establishment of Spanish rule. A sworn account of his fiscal administration while commandant of the Mobile District covers the period of April 17, 1780, to May 7, 1783, and three years thereafter, we find him (promoted to full Colonel) as commandant of Coumpeche in the Yucatan. (Manuel) Andres (Lopez de) Armesto was Secretary of the Spanish Government from 1780 to at least 1788, as also appears from papers of the Audiencia of Santo Domingo in the Archivo General de Indias in Seville, available on microfilm at Loyola University of New Orleans and conveniently accessible through the index of J. de la Peña, E. Burrus, C. O'Neill & M. Garcia, *Catalogo de Documentos del Archivo General de Indias (Sección V, Gobierno. Audiencia de Santo Dominto) sobre la época española de Luisiana (1969) (2 vols.).*

Another feature of the Boudreau grant (or concession) worth mentioning here is the translation of the surveyor's field notes from the French rather than the Spanish. Mobile, we saw, was originally a French settlement, and the Francophone population, being Roman Catholic, was not expelled after the conquest of West Florida by Spain. As stated by J. L. Wright, Jr., *Florida in the American Revolution* 142 (1975): "Almost without exception, British subjects had evacuated Pensacola, while at Mobile, though the English-speaking populace departed, the Frenchmen there and around Lake Pontchartrain stayed." The result was, apparently, the same as it had been in Spanish Luisiana after O'Reilly's takeover in 1769-70: Official communications between New Orleans and

the Posts were conducted in Spanish in both directions, since Lt. Col. Grimarest was a Spanish officer, but French remained the language of the "living law" at the Posts for lesser officials. For detailed documentation of this phenomenon, see Baade, "Marriage Contracts," *supra*, 53 *Tulane L. Rev.* at 57-73.

In Mobile, in particular, "the French language continued to be used in legal proceedings along with Spanish until some time in the 1790s." *Zahendra, Spanish West Florida, supra*, at 100, with reference.

If it is recalled that the Boudreau *diligencias* were filed with Commissioner Crawford some time between the latter part of 1812 and the date of his report (January 5, 1816), it seems unlikely in the extreme that as historically accurate and artful a document could have been concocted at the time. Spanish officials were then still in control of the Spanish archives of West Florida in Pensacola (the provincial capital), which were not surrendered to General Jackson together with that Province on July 17, 1821, see the protocol of delivery of possession, 2 *White's Recopilacion* 223, 224. Furthermore, while there were abundant allegations of forgery of land grant papers in *East* Florida a few years later, see P.W. Gates, *History of Public Land Law Development* 111 (1968) and H. J. Doherty, Jr., *Richard Keith Call, Southern Unionist* 57-69 (1961), I am aware of no such assertions about Spanish land titles in the Mobile District.

It is my opinion, therefore, that the paper writing described as the "grant hereto annexed" in the application of E. Lewis to Commissioner Crawford on behalf of the heirs of Catarina Boudreaux is highly likely to have been the actual record of *diligencias* for

the grant of Horn Island, pursued to conclusion on behalf of Catarina Boudreau before the Spanish authorities in 1781. Both the status of the translation of the *diligencias* as evidence before United States court today and their effect on title to Horn Island at the time of their consummation, however, require separate discussion.

2. Formal Proof

The above description is based on an English translation of the *diligencias* concerning the Boudreau grant (or concession), found in Volume 203, Land Claims East of the Pearl River, Evidence Book B, Item 126 (National Archives, Washington, D.C.). As received and archived originally, it was part of the record documentary of the first Report of the Land Commissioners East and West of the Pearl River, on Private Land Claims, of January 5, 1816, reproduced in 3 American State Papers, Public Lands 7 *et seq.* (1834). The claim of the "Heirs of Catherine Boudreau" which appears there as Item 51 on p. 15 describes the property as being "6 leagues in length, with various widths," situated in the "Gulf of Mexico," but does not identify it as Horn Island.

The report just quoted was prepared by William Crawford, one of the two Land Commissioners East and West of the Pearl River appointed pursuant to Act of Congress of April 25, 1812, 2 Stat. 713. (He was the Land Commissioner East of the Pearl River.) Pursuant to Section 1 of the Act of April 25, 1812 which created his office, Commissioner Crawford was authorized to "appoint a clerk, capable of translating the French and Spanish languages, who shall . . . perform the duties of translator," when so required by the Commissioner. Like the Commissioner, the

clerk had to take an oath or affirmation before entering upon the duties of his office, truly and faithfully to execute the duties imposed upon him by that enactment.

Section 2 of the Act of April 25, 1812, directed the Commissioner, together with his clerk, "to attend in each of the several parishes in his district, at such time and place therein as he shall appoint, for the purpose of receiving notices and evidences of titles and claims to lands within the same." Section 3 dealt with notice to claimants. Section 4 started by providing that "every person claiming lands in the tract of country aforesaid, by virtue of any grant, order of survey, or other evidence of claim whatsoever, derived from the French, British, or Spanish governments, shall deliver to the commissioner for land claims, when attending for the purpose, in the parish in which the lands claimed may lie, a notice in writing, stating the nature and extent of his claims, together with a plat (in case a survey shall have been made) of the tract or tracts claimed." It then went on to require every claimant to "deliver to the commissioner, when attending as aforesaid, for the purpose of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim." These writings were to be "recorded by the clerk, in books to be kept for that purpose, on his receiving from the party or parties at the rate of twelve and an half cents for every hundred words contained in such written evidence of their claim."

In the case of lands "claimed by virtue of a complete French, British, or Spanish grant," it was not necessary for the claimant "to have any other evidence of his claim entered at large on the record, except the

original grant or patent, together with the order of survey, and the plat." The penalty for failure to record claims as thus specified was substantial: a person failing to do so was *never* to have his claim recognized or confirmed by the United States, and no "grant, order of survey, deed, conveyance, or other written evidence, which shall not be recorded as above directed, (was) ever after (to) be considered or admitted as evidence in any court of the United States, against any grant which may hereafter be derived from the United States."

It follows that the paper writing recorded as Item 126 in Volume 203, Land Claims East of the Pearl River, Evidence Book B, is a translation from the French and Spanish, made by a public official of the United States in the course of his official functions from papers submitted to him as required by law, and recorded by him in a "book(.) kept by him for that purpose" as mandated by Act of Congress. It is, however, not the original of a Spanish grant (or concession), and it is a translation—albeit one by an official translator sworn to do his duty in this respect—what is called in *United States Delespine's Heirs*, 37 U.S. (12 Pet.) 654 (1838) "the original translation" of a paper writing in Spanish submitted to the Land Commissioners.

It was held in *Delespine*, *supra*, that such a translation was admissible evidence in proof of a Spanish grant (incidentally, for forty-three thousand acres), where there was also proof that this translation was the best evidence "which could be given of the existence of an original paper lost or destroyed." 37 U.S. (12 Pet.) at 655-56. In that case, there was proof of loss of the original.

The fate of the Spanish archives of West Florida is chronicled by Irene A. Wright, "The Odyssey of the Spanish Archives of Florida," in A. C. Wilgus, Ed., *Hispanic American Essays, A Memorial to James Alexander Robertson* 169-201 (1942). The author states, *id.* at 169 note*: "This paper is part of a report made in the course of my work as associate research expert, Division of Reference, in the National Archives—a term more applicable to the collections within the building than to the institution itself."

Within a few years after the United States received custody of the Spanish archives of West Florida at Pensacola on July 17, 1821, *id.* at 169-70, Congress authorized the appointment of two keepers of the public archives of the (then) Territory of Florida, located at St. Augustine in East Florida and at Pensacola in West Florida, respectively. Act of March 3, 1825, sec. 9, 4 Stat. 125, 126. Pursuant to section 11 thereof, *id.* 126, these keepers of the public archives were to make "a faithful and complete translation and record of all the Spanish records, and documents delivered to them, and having relation to land claims derived from the Spanish and British governments, distinguishing and keeping separately those which relate to grants made within the district of Baton Rouge, Mobile, north of latitude thirty-one, and those made within the present limits of Florida." (emphasis added). A full and complete descriptive list of these translations and records, when completed, was to be forwarded to the Secretary of the Treasury.

Joseph E. Caro was appointed keeper of the public archives of West Florida on March 7, 1825. Wright at 183. As stated by Wright at 183-84:

> Under date of December 12, 1818, Caro sent to Richard Rush, secretary of the treasury, partial results of his labors in "a general abstract lettered A containing a descriptive list of all the Spanish records and documents having relation to land claims, duly translated and recorded in the first volume of the Record Book containing five hundred and sixteen pages, beginning on the 17th day of May 1871 and ending on the 6th day of October 1815." On January 2, 1829, he sent the conclusion of the work in a similar abstract, to August 16, 1822. Both he duly certified, and these, bound together in one volume entitled "Abstract (A) of West Florida Archives" and numbered 3, are now in the files of the General Land Office, Department of the Interior. (Footnotes omitted).

It is believed that this set of records contains the English translation of the Boudreau *diligencias* here discussed.

The Spanish West Florida archives themselves remained in Caro's custody in Pensacola until his death (1860?). They were removed from Pensacola for safe keeping to Greenville, Alabama when Pensacola was evacuated by the Confederates. *Id.* 190-91. When returned to Pensacola after the war, they included "five leather-bound volumes containing records of the original documents which on being presented to the board of commissioners were recorded by them and the original papers retained by the parties interested, 138 leaving no original documents in the custody of the keeper of the Spanish archives." Wright at 193, adding in note 138: "Or as elsewhere stated, sent to the General Land Office."

This set of records is likely to have contained the official transcript, *in Spanish*, of the Boudreau *diligencias*. It perished, together with the remaining Spanish West Florida archives, at a "great fire" in 1885. *Id.* at 196.

Thus, it is no longer possible to reconstruct, through archival research, the Spanish archives of West Florida, including those of the Mobile District. The paper writings in the Evidence Books for Land Claims East of the Pearl River which are currently in the National Archives are quite literally the "best evidence" of these records in so far as they pertain to Spanish land grants and concessions. It follows that the English translation of the Boudreau *diligencias* recorded in those Evidence Books is admissible in evidence of the original 1781 grant or concession on the direct authority of *United States v. Delespine's Heirs*, 37 U.S. (12 Pet.) 654 (1938), *supra* p. [167]. See also, to the same effect, *Texas Mexican Railway Company v. Jarvis*, 69 Tex. 527, 538-39, 7 S.W. 210, 215-16 (1888). This paper writing is also self-authenticating under Federal Rule of Evidence 901(b)(7), and within judicial notice under Rule 201(b), see *Massachusetts v. Westcott*, 431 U.S. 322, 323 note 2 (1977).

3. Legal Effect

It should be recalled that Mr. Beggerley, on whose behalf the present memorandum has been prepared, founds his claim to part of Horn Island on purchases at tax deficiency sales from the State of Mississippi, and not on the grant (or concession) of the island on August 1, 1781, by Governor Galvez to Catarina Boudreau. That grant (or concession) is, however, crucial to his assertion of title as against the United States,

for unless Horn Island passed out of the public domain of a prior sovereign before the United States became the territorial sovereign of the portion of Spanish West Florida (or of retroceded French Louisiana) encompassing Horn island, it passed automatically to the United States by state succession.

The alternative between private and public lands is a stark one, reflected both by articles 2 and 3 of the Louisiana Cession Treaty of 1803 and articles 2 and 8 of the 1819 Treaty of Amity, Settlement, and Limits with Spain, *supra* pp. 10, 13-14-15, & 20. The crucial operative dates are brought into focus by the judicial endorsement of the assertion of the United States to sovereignty over Spanish West Florida between New Orleans and the Perdido River. In short, the United States does not recognize any Spanish land grants (or concessions) in this area if made on or after October 1, 1800. It does, however, recognize (as it is obligated by both treaties to recognize) Spanish land grants (or concessions) in the portion of West Florida as just defined, if complete *before* October 1, 1800, with the result that the lands thereby transferred out of the Spanish public domain and transmuted into private property did not become part of the public lands of the United States through state succession. This is, however, subject to the qualification that any such lands which reverted to the Spanish (or French) public domain before the effective date of the Louisiana Cession (December 20, 1803) were incorporated into the public lands of the United States on that date.

We are thus faced with two questions. First and foremost, did the grant (or concession) of Horn Island by Governor Galvez to Catarina Boudreau, under Spanish law as in effect in Spanish West Florida at

the appropriate time, operate to sever that island from the Spanish public domain? Secondly, and again under the same law, did Horn Island revert to the Spanish public domain before October 1, 1800 or, perhaps, November 30, 1803 (the effective date of the retrocession of "Louisiana" from Spain to France)? These two questions will be discussed here in the order just indicated.

We start with the last entry in the English translation of the Boudreau grant (or concession) *diligencias*, reproduced *supra* [pp. 156-157]. It will be seen that Governor Galvez' recital of prior steps in this matter is, in two respects, not supported by prior entries in this dossier, or *expediente*. First, contrary to what is said in the first sentence of the concession (or grant) of August 1, 1781, there is no record showing that the post commandant, Henrique Grimarest, had "given" possession of Horn Island to Catarina Boudreau. Secondly, it is stated that no prejudice was caused to the "aforesaid" inhabitants (of the Mobile District) as they had not claimed Horn Island for themselves but "consented as their assistance justifies"—*i.e.*, as shown by their participation in the act of possession, which, however, is *not* recorded in the expediente.

The explanation is simple: The Governor General (and Intendant) was following from precedent, and was assuming compliance with custom and regulations followed in Spanish Luisiana in similar cases. The pertinent custom is sketched in the letter by Juan Ventura Morales, quoted *supra* at pp. [157-158]. The regulations followed in land grant cases in Luisiana under direct Spanish rule are those proclaimed by Alejandro O'Reilly on February 18, 1770, and

reproduced in English translation in 2 *White's Recopilacion* 228-31. The essential procedural steps to be followed in land grants are set forth in article 12 of these Regulations, which reads as follows:

> All grants shall be made in the name of the king, by the governor general of the province; who will, at the same time, appoint a surveyor to fix the bounds thereof, both in front and depth, in presence of the judge ordinary of the district, and of two adjoining settlers, who shall be present at the survey. The above-mentioned four persons shall sign the verbal process which shall be made thereof, and the surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government, and cabildo, another shall be delivered to the governor general, and the third to the proprietor, to be annexed to the titles of his grant. *Id.* at 230-31.

As will be seen, Commandant Grimarest and the (unnamed) surveyor omitted the step of summoning two "adjoining settlers" when putting Mme. Boudreau in possession, and of recording this act in a *procés-verbal* signed by the two officials along with the two neighbors. This omission was probably due in part to the unfamiliarity of these officials with the text of the Regulation just quoted and with Spanish land-grant practice in general, as shown by the use of the French language by the surveyor in his field notes (Grimarest, obviously affluent in Spanish, was a carer infantry officer). Omitting these formalities was also, in the event, quite harmless, for an island some ten miles off the shore and granted *in toto* has no "adjoining settlers" to be put on notice of the new

arrival so as to have an opportunity to assist in the demarcation of the respective adjoining estates.

The second sentence of article 12 of O'Reilly's 1770 Regulations quoted above lends substantially to an understanding of the two last operative clauses immediately preceding the signature and attestation clause (starting with "We Give") in the instrument signed by Governor General Galvez on August 1, 1781. These are the *habendum* clause and the documentation clause. The habendum clause starts, as was usual at the time, with a word written in bold script (USING) here rendered in capitals. It is separated from the documentation clause ending with a word which I have been unable to decipher, but both of these tasks are rendered relatively simple in the light of the text of article 12 of O'Reilly's above-cited Regulation.

That is obviously the "Regulation of [better: on] this *subject*" referred to at the end of the documentation clause. As stated in article 12, one of the three copies of the *procés-verbal* was to be given to the "proprietor, to be annexed to the titles of his grant." The purpose is clear. The survey and plat, annexed to the concession, were to be the title documentation of the grantee. The grant (or concession) was the sovereign decision severing the land described in the survey and plat from the Royal domain (*realengos*) and transferring ownership thereof to the grantee. The grant (or concession) incorporated the survey and plat by reference but not textually. Both documents were needed, therefore, by the grantee to prove his title and the boundaries thereof.

It is also quite clear that the documentation thus regulated is of a *grant*, to be used if necessary by the

proprietor. This is stated in so many words in the translation of article 12 of O'Reilly's Regulation in 2 *White's Recopilacion* at 231. Without present access to the Spanish text thereof, I am confident that the former term was *concesión* (as it later was to be in the Spanish version of article 8 of the 1819 Treaty), and the latter term, *propietario*.

It follows that the key words in the *habendum* clause: "we grant in his Royal name to the said Catharine Vincenarde, Widow Beaudreau, the said Horn Island situated upon the aforesaid Coast of Mobile, that as her own she dispose of and enjoy it," are words of Royal grant *de praesenti*. These key words are "we grant" and "her own," reading *concedemos*" and *su propio* in the original in Spanish grants at the pertinent time and place, the latter tying directly to *propietario* in article 12 of the above quoted Regulation. The former of these terms was not in any way inferior to the English term, "grant": *concesión* was at the time the Spanish equivalent of the noun, "grant," and *concedemos* was translated quite accurately by the clerk-translator of Land Commissioner William Crawford as "we grant." A like instrument, executed by Governor Galvez in New Orleans barely over three weeks later, on August 23, 1781, in favor of Narcisse Carriere, was later described as the Land Register of Opelousas as "a complete Spanish Grant, the most authentic and complete that is known—It is therefore recommended for confirmation." American State Papers, 4 Public Lands at 506.

Nevertheless, as shown by the tabulations used by Commissioner Crawford in his First Report of January 5, 1816, he classified the Boudreau *concesión*

as a "concession," although he also employed the word "grant" in other contexts. This may merely reflect a schematic classification according to the form of the title paper (or papers), with "grant" describing English-style self-contained documents in the style of a charter, and "concessions," composite title documentations. There is, however, the possibility that Commissioner Crawford deemed "concessions" to be of lesser finality than "grants."

An argument along these lines was later put by counsel for the United States in a number of East Florida cases. (R. K. Call), Argument of Counsel for the United States in *United States v. Clark(e) Huertes, Hernandez et al.*, much later reprinted in American State Papers, 8 Public Lands 289-96 (1861). It was summarily rejected in *United States v. Clarke*, 34 U.S. (9 Pet.) 168 (1835). Speaking through Chief Justice John Marshall, the Court said: "The validity of concessions is, we think, expressly recognized both in the [1819] treaty and in the several acts of Congress."

It follows that the Boudreau *diligencias* officially transcribed in English translation into Item 126, Evidence Book B, Land Claims East of the Pearl River, documented a complete grant *de praesenti* severing Horn Island from the Spanish royal domain and transmuting it into privately owned property. There remains the possibility, however, that this grant was invalid as in violation of Spanish law binding at the time on Governor General Galvez, or that the land then granted was subsequently reincorporated into the Spanish public domain through forfeiture or abandonment. Both of these alternatives are suggested, in a general manner, by Commissioner

Crawford, who stated with respect to the 111 claims (including that of the heirs of Ms. Boudreau) not recommended by him for confirmation: "The preceding claims are forfeited—most of them under the Spanish law, for want of inhabitation and cultivation; and do not appear to be entitled to confirmation under any law of the United States. A few are derived from officers who had no right to grant, or, at most, not in so extensive a scale." First Report, at 17.

We are concerned here initially with the possibility that Governor General Galvez did not have "the right to grant . . . on so extensive a scale." (He obviously had the right to grant.) Horn Island is shown by the survey to be "about six leagues, or more" in length but of width varying between one quarter to more than half a league. Assuming its average width to be one-third of a league, its dimensions in Spanish nomenclature then in use were about two square leagues—two *sitios* of 5,000 varas square or possibly slightly more (or less): between 8,856 and, perhaps, 10,000 acres of Anglo-American surface measure. When it is recalled that this was a grazing grant, its size does not seem extravagant. The normal unit of a cattle-grazing grant (*sitio de ganado major*) was a *sitio*, or square Spanish league.

Article 8 of O'Reilly's 1770 Regulations, 2 *White's Recopilacion* at 230, provided only that "No grant in the *Opelousas*, *Attacapas*, and *Natchitoches*, shall exceed one league in front by one league in depth" (emphasis added)." No such restriction applied to cattle grazing grants in the newly conquered province of West Florida. In any event, as noted by the intendant-to-be in 1797, limitations laid down by O'Reilly's 1770 regulation were "not followed with

such exactness that there were not some exceptions." Morales, quoted *supra* at [157, 158]. For instance, a grant of some 5,876 acres in Natchitoches was reported as valid by the Land Register at Opelousas in reliance of the testimony of Felix Taudeau that "grants of land, now generally two leagues each or more, in that part of the Spanish province, were granted to all who demanded them by the governors of provinces; never less than one league square was granted." Claim of C. Pavie & C. Noyrit for "Los Llanos," American State Papers, 4 Public Lands at 508, 509.

This matter is, moreover, concluded by authority. As stated in *United States v. Arredondo*, 31 U.S. (7 Pet.) 691, 720 (1832):

> The validity and legality of an act done by a governor of a conquered province depends on the jurisdiction over the subject matter delegated to him by his instruction from the king and the local laws and usage's of the colony, when they have been adopted as the rules for its government. If any jurisdiction is given, and not limited, all acts done in its exercise are legal and valid; if there is a discretion conferred, its abuse is a matter between the governor and his government.

Even more directly to the point, it was held by John Marshall in *Delassus v. United States*, 34 U.S. (9 Pet.) 117, 135 (1835), that O'Reilly's [1770] regulations "were intended by the general government of subordinate officers, not to control and limit the power of the person from whose will they emanated," *i.e.*, the Governor General of Spanish Luisiana. So far as I can determine, no grant by an official of that or of comparable rank has been held invalid by the Supreme

Court of the United States. Further authority in point is cited *id.* at 134. In *United States v. Rodman*, 40 U.S. (15 Pet.) 130, 138 (1841), the Supreme Court upheld the validity of a Spanish grant of five square miles, vastly in excess of the quantity indicated by the Royal Order in reference to which it was made. As stated by Mr. Justice Wayne:

> That the Governor had the power to make the larger grant, cannot be denied. It is to be found in the laws of the Indies, in the various regulations under which they granted lands in Florida, for more than forty years; sanctioned by the king of Spain, and the authorities representing him in Cuba, the Floridas, and Louisiana. The power of the governor, in this respect, has been frequently affirmed by the decisions of this Court, in cases growing out of claims to land under the eighth article of the treaty with Spain.

4. "Forfeiture" or Abandonment

It follows from the above discussion that the "concession" signed by Governor General Galvez on August 1, 1781 was, in conjunction with the survey and plat incorporated therein by reference and physically attached thereto in the same *expediente*, a valid grant of Horn Island under the law applicable at the appropriate time and place. As such, it severed Horn Island from the Spanish crown lands (*realengos*) and transmuted it into private property.

This leaves for final discussion the question whether, under the law of a former sovereign applicable at the appropriate time and place, Horn Island was re-integrated into the public domain of such former sovereign so that it became part of the public lands of

the United States when this country acquired dominion over Horn Island. Commissioner Crawford based himself on the assumption that there was a rule of Spanish law so providing. His main reason for *not* recommending 111 "claims, of various dimension for confirmation" was that they had been "forfeited—most of them under the Spanish law, for want of inhabitation and cultivation." American State Papers, 3 Public Lands at 17 (1836).

Inhabitation and cultivation, we saw much further above, were key terms used by the Act of April 25, 1812 under which Commissioner Crawford conducted his operations. Section 5 of that act, quoted *supra* p. [138], directed the commissioners to "ascertain, *in every case*, whether the lands claimed have been inhabited and cultivated," and also "at what time such inhabitation and cultivation commenced" (emphasis added). Thus, the Commissioners were expressly directed to determine the inhabitation and cultivation *vel non* (and if so, the date of commencement thereof) even as to land claimed under valid and complete Spanish grants. That statutory mandate apparently led the commissioner to the assumption that "inhabitation and cultivation" were, *under Spanish law*, pervasive and indispensable preconditions for the continued validity of complete land grants, or that the United States was (and would remain) free, under international law, to condition its recognition of valid and complete Spanish land grants on the "inhabitation and cultivation" of the land granted. Both of these assumptions would have been in error—the latter excusably so, because the Treaty of Amity, Settlement, and Limits with Spain was not even signed until 1819, and because the clarifying jurisprudence of the Supreme Court as to the significance of that treaty for the continued validity of Spanish land grants commenced more than a full decade thereafter.

First, as to Spanish land grants under Spanish law: Article 2 of O'Reilly's 1770 Regulations obligated new settlers receiving lots of six or eight arpents frontage along the Mississippi to build levees and drainage ditches, and to clear the whole front of their lands to a depth of two arpents within three years of obtaining possession. In default of fulfilling these obligations, it provided, "their land shall revert to the king's dominions and be granted anew." 2 *White's Recopilación* 228, 229. The reason for this draconic provision in simple, and stated tersely by Mr. Justice Catron in *Jourdan v. Barrett*, 45 U.S. (4 How.) 169, 180-81 (1846): "Annually the Mississippi overflows, and to prevent inundation of the country, heavy and expensive embankments are required . . . The country would be worthless without them."

No comparable obligations were attached, however, to grazing grants, measured in leagues rather than arpents. See article 8 of the Regulation, 2 *White's Recopilación* at 230. Obviously, Horn Island needed neither levees nor frontage clearing for use of a cattle ranch. That it was so used is shown by the entry in the When, By Whom, and Cultivation columns in Commissioner Crawford's report on the claim of the Heirs of C. Boudreau, in right of Catalina Boudreau, No. 51 on p. 15 of his First Report as published in American State Papers, 3 Public Lands (1834). That entry, to repeat, reads as follows: "Cattle have been generally kept upon the island, and formerly negros to attend them, but not inhabited or cultivated." Put more directly, Horn Island was used by, or by license

of, its grantee, who "formerly" exhibited direct possession by "keeping" slaves as cattlemen on the island.

Thus, the record suggests that Catarina Boudreau, or her heirs, fulfilled whatever implied obligations a cattle rancher might have had at the time to maintain the validity of his grant. This question has, however, been rendered moot by subsequent authority. It was later argued by counsel for the United States that Spanish land grants carried with them implied conditions of use for the purpose expressly applied for, but even this argument was curtly rejected by the Supreme Court. As the Court stated, in *United States v. Segui*, 35 U.S. (10 Pet.) 306 (1836): "we cannot attach *any* condition to a grant of absolute property in the whole quantity" (emphasis supplied).

Secondly, as to the recognition by the United States of complete Spanish land grants under the general international law of state succession and the 1819 Treaty of Amity, Settlement, and Limits: The first sentence of article 8 of that treaty, *supra* p. [143] and 8 Stat. at 258, provided that:

> All the grants of land made before the 24th day of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United State, shall be ratified and confirmed *to the persons in possession of the lands*, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty. (emphasis supplied).

It was thus possible to argue that this treaty ratified and confirmed Spanish land grants only to per-

sons in possession of the lands when that treaty entered into effect (February 22, 1821). This argument was, however, squarely rejected in *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 743 (1832), where the Court said, in reference to that language of the treaty:

> The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title; this seisin and possession is coextensive with his right and continues till he is ousted thereof by an actual adverse possession. This is a settled principle of the common law, recognized and adopted by this court . . . (citations). And is not now to be questioned.
>
> This gives to the words "in possession of the lands" their well settled and fixed meaning; possession does not imply occupation and residence; had it been so intended, we must presume they would have been used. By adopting words of a known legal import, the grantors must be presumed to have used them in that sense, and to have so intended them; to depart from this rule would be to overturn established principles.

It follows that the validity of the Galvez grant of Horn island to Catarina Boudreau did not depend, either under Spanish law or under international law as enforced in the United States, on the "inhabitation and cultivation" of that island by or on behalf of the grantee. Even "possession" of that island in the literal sense, we just saw, was not a precondition for the (automatic) ratification and confirmation of that grant by the 1819 Treaty.

There remains, finally, the (remote) possibility that the grant was abandoned while Spanish law was locally in effect, for unlike the common law, the civil law of Spain as then in force recognized the notion of loss of title to real property through dereliction (abandonment) even in the absence of acquisitive prescription (adverse possession) by a stranger in title. As provided by Law 50 of Title 28 of the fifth *Partida*:

> When a man abandons any immoveable property which belongs to him, for the reason that he does not like it, as soon as he actually leaves it with the intention of not claiming it afterwards as his, whoever first enters upon it will become its owner. But where he does not leave it, although he may state that he does not desire it to be considered his from that time forth, nevertheless while he still holds it in this way no one else has the right to enter upon it; and if he does, he will not obtain its ownership until the party actually leaves it, and abandons its possession.

It seems too clear for argument that neither Catarina Boudreau nor her heirs had "actually abandoned" Horn Island in that sense. Cattle were regularly kept on the island, at times with "negros" (slaves) in place to mind them; Mrs. Boudreau apparently kept, and her heirs were able to present, the title documentation. Even if there had been actual abandonment of Horn Island by Catarina Boudreau or those in privity of title with her, however, the island would not have thereby reverted to the status of Crown land (*realengo*) under Spanish law then in effect in the Mobile District. As held most recently (and convincingly) in *Atchley v. Superior Court*, 482 S.W.2d 883, 903 (Tex. Civ. App.—Eastland 1972), writ

ref'd n.r.e., it follows from the first sentence of Part. 3, 28, Law 50, *supra*, that "even upon abandonment title to the land does not revert to the sovereign but passes from the landowner to the first entrant."

Therefore, even in the (extremely unlikely) event that Horn Island was "abandoned" by Mrs. Boudreau or her heirs while Spanish law applied there, that property would not thereby have become part of the Spanish public domain but would have remained private. Consequently, it could not even then have become part of the public lands of the United States by state succession.

Summary and Conclusion

This memorandum deals with two simple questions. Was Horn Island validly granted in private property under Spanish rule, and if so, did it later revert to the status of Spanish Crown land through forfeiture or abandonment? These questions are of current relevance because private proprietary rights to that island have recently been asserted (and denied), and title to it has been quieted (as federal public land) in the United States.

It is hornbook law that land validly granted in private property by a prior territorial sovereign did not become part of the public lands of the United States by state succession. The main issue to be addressed herein, therefore, was whether a grant (*or concesión*) of Horn Island by Governor General Bernardo de Galvez to Catarina Boudreau, dated August 1, 1781, was valid under Spanish law then prevailing in the "Mobile District."

The grant here involved contains historical references and peculiarities of use of language which sup-

port its genuineness. It appears to be preserved only in the form of an English translation, but this was made, as required by Act of Congress, by an official of the United States sworn to his duty. It was recorded in a book of records kept pursuant to federal statutory mandate, and is still kept in the United States archives. There is persuasive evidence, compiled by a United States archivist in her official capacity, that the Spanish archives of West Florida (where the Spanish original of the grant might be found) were destroyed by fire more than one hundred years ago.

The area in which Horn Island is located (Spanish West Florida between New Orleans island) was contested between Spain and the United States, but not until 1804—long after that island was granted by Governor Bernardo de Galvez to Catarina Boudreau. Consequently, this grant was ratified and confirmed, so far as the United States is concerned, as a valid and complete Spanish land grant (*concesión de ierrenos*) by article 8 of the 1819 Treaty of Amity, Settlement, and Limits between Spain and this country.

This conclusion is supported by a number of well-known (but seldom read) decisions of the Supreme Court of the United States, rendered mainly in the fourth decade of the nineteenth century. These decisions also establish that the validity of the 1781 grant was not affected by its size (about two square leagues) or by the (possible) lack of continuous physical possession by the grantee. Again as spelled out by United States Supreme Court jurisprudence, the decision of the Land Commissioner East of the Pearl River not to recommend this grant for confirmation by Congress did not affect its validity. Since the Bou-

dreau grant documentation evidenced "complete title," it did not even have to be filed with that Land Commissioner. *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1169 (5th Cir. 1982) cert. denied, 464 U.S. 814 (1983).

Forfeiture and abandonment are non-issues in this context. Inhabitation and cultivation were not prerequisites for the (automatic) ratification of complete Spanish land grants (such as this one) by the 1819 Treaty, nor prerequisites for the validity of grants under Spanish law. Finally, even abandonment by the grantee (massively contradicted by the known facts) would not have reconverted Horn Island from private property into public land.

In conclusion, it is my opinion that as established by competent and persuasive evidence documentary, the pertinent jurisprudence of the Supreme Court of the United States, and Spanish law in effect at the relevant time and place, Horn Island was not part of the Spanish West Florida public domain when the United States acquired dominion over the area. In consequence, it was not incorporated into the public lands of the United States.

October 1, 1993 /s/ HANS W. BAADE
HANS W. BAADE

DEPOSITION OF MICHAEL KNIPFING

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. S79-0338(R)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ANDREW J. ADAMS, JR., ET AL., DEFENDANTS

PROCEEDINGS

MR. CAMERON: On the record. I would like him to sign this.

STIPULATION: It is stipulated by and between the parties that this deposition is being taken by agreement, pursuant to the Federal Rules of Civil Procedure. All objections, except those as to the form of the question, are reserved until such time as this deposition, or any part thereof, is sought to be introduced into evidence by either party.

MR. CAMERON: Please give him the oath.
Whereupon,

MICHAEL J. KNIPFING

was called as a witness and, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. CAMERON:

Q. State you name, please.

A. Michael J. Knipfing.

Q. What is your home address?

A. 5009 40th Place, Hyattsville, Maryland.

Q. What is your business address?

A. 350 South Pickett Street, Alexandria, Virginia.

Q. What is your occupation?

A. I'm a member of the staff of Branch of Lands and Title Adjudication in the Bureau of Land Management.

Q. What is your function in that position?

A. As a member of the branch, I deal with realty matters before the Bureau, rights-of-way, applications under the Color of Title Act, swamp applications, applications for leasing under the Recreation and Public Purposes Act, applications for conveyance of federally owned mineral interests under section 209 of the Federal Land Policy and Management Act. Other realty matters that the BLM would have an interest in.

In addition to those realty matters, the primary function of our office is dealing with the old records of the General Land Office which are still used today to help determine the status of public domain land as to when it was severed from the public domain, if ever.

Q. What is your educational background?

A. I have a bachelor's degree with a major in history from Mount St. Mary's College in Emmitsburg, Maryland. I have a law degree from Catholic University School of Law.

Q. What year did you get your law degree?

A. 1974.

Q. And your bachelor's degree?

A. '71.

Q. How many years have you been in your present position?

A. 3-1/2 years.

Q. What occupations have you had prior to this position?

A. Prior to this position, I worked for three years with the Prince Georges County which is a local county here in their zoning enforcement office. I was liaison between that office and their county office of law. I represented the county before administrative tribunals within the county, the board of administrative appeals, the board of zoning appeals.

Prior to that, I held jobs while I was in law school. I worked in the mail room of Lord & Taylor for awhile and I cut lawns for 11 years.

Q. How many people do you supervise now?

A. I don't supervise anyone except on—when I'm acting for the branch chief, I supervise approximately five.

Q. And you substitute as the acting chief when the branch chief is away?

A. Yes.

Q. Who is the branch chief?

A. William Dorasavage, D-o-r-a-s-a-v-a-g-e.

Q. Could you say that you were his deputy?

A. You could say that.

Q. How did you come to be associated with this lawsuit?

A. Well, I was requested by our regional solicitor in Atlanta to search our records and provide information from the records and provide copies of the records concerning certain lands located in the Gulf of Mexico that are on Ship, Horn, and Petit Bois P-e-t-i-t, B-o-i-s, two words.

Q. Who is the regional solicitor who made this request?

A. My first contact was with Jim Becker in that office.

Q. What were your directions from Mr. Becker?

A. To search our records, give him copies of records and advise him of other places he could look to find when and if the United States divested itself of title to these lands.

Q. Approximately what year was this?

A. Early 1981. I believe.

Q. When did you start employment there?

A. December of '78.

Q. When you began your employment there, were you put into this position upon your employment?

A. Yes.

Q. As deputy to Mr. Dorasavage?

A. No. I did not become acting chief to Mr. Dorasavage for about a year and a half.

Q. What assignments in particular did Mr. Becker give to you?

A. Well, it was a general request to search the records and get copies of any pertinent documents I could find relating to the disposition of those lands. It was nothing specific.

Q. Was it written? A written request?

A. It may have been written. I know there was some correspondence. But, I'm not sure.

Q. Did you meet with Mr. Becker?

A. Yes.

Q. When was this meeting, the first meeting?

A. Approximately a year ago. He flew up from Atlanta to meet with me.

Q. During your examinations of the records, how extensive an effort did you make?

A. I was primarily concerned with the records in the custody of our office. Those records in the tract books, the patent records. The plats and the field notes are also in the custody of our office. However, I did not examine them.

When the records in the custody of our office referred to records in the custody of other offices, I advised Mr. Becker and the Justice Department of where they could probably be located. I did not do searches in other offices to any great degree at all.

Q. Did you search any other office at all?

A. Yes. I personally, with Mr. Becker, went to the Department of State, went to the Library of Congress geography division and to the cartographic archives.

Q. What did you find at the library of Congress geography division?

A. I don't recall if we found anything.

Q. What did you find at the cartographic office?

A. The cartographic office, we were looking at exhibits from, as I recall, some old Supreme Court cases dealing with the federal acquisition of title down in that area. And I believe on one of the exhibits, I found a reference to a Supreme Court case that I gave to Mr. Becker and to Justice concerning a court decision that was determined related to recognition of that land coming to the United States through the Louisiana Purchase.

Q. What record, if any, did you find at the Library of Congress?

A. To my knowledge, we didn't find anything. I don't recall finding anything there. We were looking at maps. I don't recall finding anything.

Q. What records, if any, did you find at the State Department?

A. A transcription or a copy of the Louisiana Purchase. I think that's what we were looking for.

Q. Do you recall the names of any individuals that you met with at the State Department?

A. No.

Q. Library of Congress?

A. No.

Q. Cartographic office?

A. I really don't. It would have been someone in their office of, I think it is called, Fiscal and Judicial Archives, or something like that that has jurisdiction over the custody of Supreme Court exhibits. I don't remember the name of the person.

Q. Did you recommend any further searches to Mr. Becker?

A. Well, I didn't think it was my position to recommend anything to Mr. Becker. I just told him what our records showed, what we had, and I did advise him and the Justice Department as to where these other case files might be if they wanted to look further.

Q. And these are the plats that you just mentioned that you recommend?

A. No. Those are the places I went to. You asked me what places I went to.

Q. What other places did you recommend?

A. I recommended going to Suitland, Maryland. In Suitland, we have the National Archives and Records Service. I also recommended going to Suitland, Maryland, where the Federal Records Center is located. I also probably recommended a search in the National Archives beyond the cartographic division and I may have recommended other avenues, looking at abstracts of title or at the county recorder, stuff like that. I don't remember.

Q. Did you, at any time, or anyone working with you or for you, research records at the National Archives and Record Services center in Suitland, Maryland?

A. I have not researched those records.

Q. Do you know if Mr. Becker researched those records?

A. I don't believe he did. I believe the Justice Department researched those records.

Q. What about the Federal Records Center? Did you examine any records there?

A. We had—I did not go there and examine records. We may have had a file or two sent to us from there.

Q. Do you recall which files they were?

A. I believe the file that I recall was a file concerning a canceled homestead application. But I can't be more specific than that.

Q. Do you recall the individuals that you dealt with at the Federal Records Center that provided this information?

A. No. The general reference office or whatever the office is over there.

Q. Did you make this contact by telephone?

A. Yes.

Q. Do you know who at the Department of Justice conducted the search at the National Archives record center?

A. Not specifically I don't, no.

Q. Do you know when this was done?

A. No. I would assume last year, but I don't know.

Q. You mentioned one other, the National Archives. Did you or anyone working for you examine records at the National Archives?

A. I did not go to the National Archives except with Mr. Becker that one time to look at the cartographic maps, the Supreme Court exhibits.

Q. Are you aware of any other individuals at the center where you work conducting any investigation at any of these three places I just mentioned, the National Archives, the records center, the Federal Records Center or the National Archives?

A. No.

Q. Have you discussed with attorneys from the Department of Justice your possible testimony in this case?

A. Yes.

Q. What will be the points of your testimony?

A. I would state what the records showed, explain the record if I was asked, the records in the custody of our office.

Q. We will come back to that. I have some copies of some records in your office and I would like to come back to that at a later point.

From your point of view, where is the government's title problem in this case?

A. I don't see that the government has a title problem.

Q. In your opinion, the government does not have a title problem?

A. That's right.

Q. Who is in charge of the title search other than Mr. Becker and yourself?

A. Within my office?

Q. Both within your office and other individuals maybe with other agencies.

A. I was responsible for researching my office. Who the Department of Justice assigned to do the research, I don't know.

Q. Mr. Becker is no longer with the Atlanta regional office; is that correct?

A. That is correct.

Q. Who have you received directions from since his departure?

A. I have not received directions from anyone since his departure.

Q. When did he leave that office?

A. I'm not sure.

Q. When was the last time you received a directive from him?

A. Sometime the middle of last year.

Q. To your knowledge, who has the General Land Office records?

A. What records? Which records?

Q. All records, the original General Land Office.

A. Well, my office has the original General Land Office tract books and patent records as well as the original class of survey and field notes. There are other records dispersed beyond that in those different agencies I mentioned earlier.

Q. You mean at the National Archives Record Services center and the Federal Record Center?

A. And the National Archives itself.

Q. And the National Archives.

A. There also may be records in the state archives and things like this. We still have and have always maintained jurisdiction over the tract books and the field records and the plats and field notes.

Q. You have custody in your office of only the tract books, the patent records, the plats and field notes?

A. That's right.

Q. And the plats and field notes you did not examine?

A. I did not, no.

DEPOSITION OF DR. WILLIAM J. DORASAVAGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action No. S79-0338(R)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DR. ANDREW J. ADAMS, ET AL., DEFENDANTS

STIPULATION

BY MR. MARTIN:

This deposition is being taken pursuant to the Federal Rules of Civil Procedure in accordance with notice and by agreement of the parties. All objections except as to the form of the question will be reserved until such time as any material contained in this deposition is presented to be used at the trial of this case.

BY MR. HERMAN:

Let me just say one thing, that it's the position of the Government that since Mr. Dorasavage is not a party to this lawsuit, his presence here is voluntary and is done at the request of counsel for the United States to accommodate the Defendants.

BY MR. MARTIN:

And for the record let me state that the accommodations exhibited by the Government are tremendously appreciated by all of the Defendants. I hope that the spirit of cooperation will continue throughout the course of the trial.

BY MR. HERMAN:

Let the record show that counsel for the State is laughing.

* * * * *

WILLIAM J. DORASAVAGE

Having been first duly sworn, testified as follows, to-wit:

EXAMINATION BY MR. MARTIN:

Q. Mr. Dorasavage, my name is Jim Martin, and I represent the Beggerly family, which are some of the many Defendants involved in this litigation who claim portions of Horn Island. Would you state your name and address for the record?

A. My name is William J. Dorasavage.

Q. And your address, sir?

A. My residence is at 4709 Flower Valley Drive, Rockville, Maryland, 20853.

Q. By whom are you employed?

A. I'm employed by the Department of Interior, Bureau of Land Management, Eastern States Office, Alexandria, Virginia.

Q. What position do you hold with the Eastern States Office?

A. I'm Chief, Branch of Lands and Title Adjudication.

Q. How long have you held that position?

A. I've held this position approximately 13 years.

Q. Prior to that time where were you employed?

A. Prior to that time I was an active real estate broker.

Q. Where?

A. Let me clarify the records. I came into Government in 1958 as a land law examiner, and I became Chief of Title Services in 1969. My career with the Government started in 1958.

Q. With the Eastern States Office?

A. No, with the Branch of Field Services in the Bureau of Land Management.

Q. Was that located in Washington?

A. Washington, D.C.

Q. And prior to 1958, were you an active real estate broker?

A. Yes, I was.

Q. In what area?

A. Maryland.

Q. Mr. Dorasavage, what is your educational background?

A. I attended grammar school and high school in Pottsville, Pennsylvania; I attended Catholic University, Washington, D.C., undergraduate work, and then I attended the Catholic University Law School,

where I received a Juris Doctor and Master of Laws degree.

Q. What was your undergraduate degree in?

A. I didn't have an undergraduate degree. I had four years, and then I enlisted in the Army Air Force.

Q. Your Master of Laws degree, did you have any particular area of emphasis?

A. No particular area of emphasis.

Q. Have you at any time subsequent to your law degree engaged in the private practice of law?

A. No, I haven't.

Q. Could you briefly describe what duties you performed as a land law examiner with the Field Services branch?

A. My job had to do with the adjudication of claims, applications involving the 2,000 series of 43 CFR, which of course included exchanges, withdrawals, amendment of patents, state grants, the whole category covered by the 2,000 series.

Q. All right, sir. Now, as chief of the branch of Land and Title Adjudication section, can you state to us what specific duties and responsibilities you have?

A. I report directly to the chief, Division of Lands and Minerals, and as the chief, I'm responsible for the administration of transactions involving public lands in the eastern states area and also for the adjudication of title matters.

Q. What specific duties or services do you actually perform with regard to title adjudication?

A. I review the work that has been assigned to the adjudicators, the land law examiners, the paralegal specialists, the legal technicians in my branch, and as such I implement the land laws and the regulations and manual procedures.

Q. In a typical situation, how does a question of title that may or may not involve Federal lands come to your office or to your attention?

A. We have had the year before last approximately—we've furnished over 50,000 copies of title records, tract book pages, plats of survey, patent records for the public, for attorneys, abstract companies and the like, the reason being that our office contains the original GLO patent records, copies of the patent records, the GLO tract books and the plats of survey, on which title to lands to the public domain was transferred out of the United States. Our office is the recordation office for title conveyances out of the United States.

Q. In connection with your educational process, what courses in real property law or real estate titles have you had?

A. Real property law, trusts, contracts, conveyances.

Q. Okay. Mr. Dorasavage, are you familiar with the subject matter of this lawsuit?

A. I am definitely familiar with the subject matter.

Q. When did you first become aware of this case?

A. I first became aware of this matter when title attorneys from the Park Service asked for status reports to Horn Island, Ship Island and Petit Bois

Island approximately 10 years ago. It was a request for copies of our tract book pages and a status report.

Q. That would have been approximately early 1970s?

A. Approximately. I would have to look at the record to come up with a definite date.

Q. Do you know what the nature of their request was?

A. Yes. They requested the status of these particular islands, and documented status of it.

Q. Do you know what the purpose of their inquiry was?

A. The purpose—it had to do with—at that time no, I did not know the purpose of their inquiry.

Q. Do you know now what their purpose was?

A. Their purpose was as I understand it is to—that the Park Service wants to include these lands in the Gulf Islands National Seashore.

Q. Are you familiar with the Gulf Islands National Seashore Act which was passed in the early 70's?

A. I know of it, but specifics, no.

Q. Do you know the name or names of the attorneys within the Park Service who made the inquiries with you?

A. A Mr. Becker.

Q. And did you comply with his request at that time?

A. Yes, I did.

Q. If you recall, can you tell us what documents you provided to them?

A. Copies of the tract book pages and plats of survey.

Q. Did you render any report or opinion of the status of the title on these islands at that time?

A. At that time the status of the islands was that title was still in the United States.

Q. Did you so indicate in a written report to Mr. Becker?

A. Not in a written report. All he asked for was copies of the documents.

Q. Okay. Subsequent to that inquiry, what connection have you had with these islands?

A. Approximately a year ago our field solicitor in Atlanta requested the status and copies of documents covering these three islands, Ship, Horn and Petit Bois.

Q. Do you recall his name?

A. A Mr. Becker.

Q. Did you provide documents to him at that time?

A. Yes.

Q. What documents?

A. Copies of the tract book pages and the plats of survey.

Q. Would that have been essentially the same material that you had provided to that office in the early 70's?

A. Yes.

Q. Did you render a written opinion or report at that time?

A. This particular request was assigned to one of the adjudicators, a Mr. Michael Knipfing. The request came from Mr. Becker to the director to the branch and then to Mr. Knipfing.

Q. All right, sir. And did Mr. Knipfing render a report?

A. He provided Mr. Becker with these documents, the tract book pages and the plats of survey, and he was also on the phone with him, you know, I guess interpreting the tract book pages or plats of survey. I really don't know what went on between them, but there was conversation between Atlanta and our office.

Q. Did Mr. Knipfing write a report of the work that he performed at that time on this matter?

A. No, not to my knowledge.

Q. Did he prepare any memoranda for the file?

A. No.

Q. You say that on these two occasions plats of survey were provided. Do you recall the dates of those surveys?

A. No, I don't.

Q. Subsequent to that occasion approximately a year ago, what further contact have you had with this matter?

A. Mr. Knipfing was directly in charge of furnishing the status to these islands, and as such he was in contact with the Justice Department and our

regional solicitor's office. Also I have had contact with the Justice Department attorneys.

Q. At anytime since the early 70's, have your, Mr. Knipfing or anyone else within your department issued written memoranda, position statements or reports or opinions with regard to the status of these islands?

A. Not to my knowledge, no written reports.

Q. Mr. Dorasavage, you indicated that you office possesses the original GLO patent records, plat books and tract books. Are there any other documents pertaining to title to public lands that your office possesses?

A. There are reference materials in the office pertaining to these categories of Federal land records. There are four main categories of Federal land records. First is the tract books, second the patent records, third are the plats and field notes, and fourth are the case files. Our office, the Eastern States office, has all of the original tract books, GLO tract books, GLO patent records, and we have plats of survey and field notes. The fourth category, the case files, they are in a depository in the National Archives.

Q. Now, when you say case files, what do you mean by that?

A. Well, these files would contain papers leading up to the patenting of a tract of land.

Q. Are those case files indexed by any type of system?

A. They're identified by case number.

Q. Is there a key or an index in addition to the case number? In other words, is there a source that a person could go to determine—for instance, a case file pertaining to Horn Island. Are there any indexes, catalogues or other reference material that would key into those case files?

A. The key, of course, to the records is the legal description. Back in 1785, there was an act passed called the Land Ordinance Act, and what this Act provided for was the survey of land before sale or disposal. The reason for this was to identify the land with certainty. In other words, just as we're identified by the Federal Government with our Social Security numbers, land, public domain land is identified by a legal description And at that this the rectangular system of survey was implemented, and our records, the tract book records are all indexed by legal description, which would include aliquot part, section, township, range, land district or meridian. If somebody was interested in obtaining a copy of a patent record to a certain tract of land, we would go to the particular township and range. These tract books are indexed by township and range. We would go to the section and then the aliquot part. The individual purchaser or claimant to the land, his name would be there; the acreage would be there; the cost of the land, and the case file would be identified by number. So any tract of land, public domain land that exists, we can just zero right into these tract books and identify the particular sale or case file.

Q. Without going to the tract book or the patent book, is there a way to key into the case file?

A. Yes. There are other ways you can key into the case file. You can check the local land office plats

of survey. It was the duty of the register at the time lands were disposed of in the local land offices to note the name or number of the sale on the particular tract of land.

Q. Mr. Dorasavage, are you familiar with how the United States Government acquired the West Florida territory?

A. I'm not familiar with it. I haven't looked into it.

Q. Are you familiar with what lands are considered to have been a part of the West Florida territory?

A. To the best of my recollection, these lands were included in part of the Louisiana Purchase.

Q. All right. Would you accept the statement that the West Florida territory included the barrier islands off the Coast of Mississippi, including Petit Bois, Horn and Ship?

A. I think the records will show that those islands were included in the Louisiana Purchase.

Q. And do you recall the approximate date of that purchase?

A. 1803.

Q. Do you know by whom the part of what is now the State of Mississippi below the 31st parallel was occupied by prior to 1803?

A. Do I know who?

Q. Yes, sir.

A. Our tract books fail to disclose any entry prior to 1803. In fact, there's nothing on the tract books prior to that date.

Q. So what is the beginning date of the tract book system within the United States?

A. The beginning date was approximately the year 1800.

Q. Now, is that as to the entire United States, or are we just talking about this part of Mississippi?

A. That's as to the United States. The tract book system actually started around the year 1800, and the first ledgers covered lands in Ohio.

Q. And then to the southern part of Mississippi, including these islands, the tract book system was begun sometime subsequent to 1803?

A. The tract book system would actually begin when the local land offices opened for that particular district. The registers and receivers were accountable for the tract books and for monthly registers of sales.

Q. Do you know when the land district offices for the area including Jackson and Harrison Counties, Mississippi, were opened?

A. I don't have that information in front of me, but I do have that information.

Q. Do you have an estimate at this time?

A. The land offices were usually opened at a time when the lands were surveyed and put up for sale, as a general rule.

Q. Do you know when the lands including Horn, Petit Bois and Ship Islands were surveyed?

A. I know they were surveyed, but I don't know the exact date.

Q. And it is your testimony that lands would have to be surveyed first by a duly appointed surveyor prior to those lands being disposed by way of sale?

A. That's correct.

Q. And we're talking there about public domain lands?

A. Yes.

Q. Which are lands considered to be owned by the sovereign, or the United States?

A. Yes.

Q. Do you know whether or not there were any lands included within the Louisiana Purchase which may have been subject to private claim or ownership at that time?

A. The registers and receivers received instructions in the early 1800's, about 1803-1804, regarding private land claims, regarding the admissibility of evidence regarding these private land claims, and as such they were instructed to prepare reports, abstracts, which would be sent to the General Land Office in Washington at this period, and then on to the Secretary of Treasury, and then on to Congress for whatever confirmation or whatever.

Q. By whom were these registers and receivers appointed?

A. At that time they were appointed by the Secretary of Treasury.

Q. By what authority?

A. I can't answer that.

Q. All right, sir. Do you know how the registers' and receivers' offices were set up and organized?

A. Yes. Of course, there were two people, a register and a receiver. The register was the person who took in the monies—the receiver took in the monies and the register issued the certificate. Usually in a sale, a cash sale, the purchaser retained a copy of his receipt for payment of the lands and also a copy of the certificate, which entitled him to a patent. The other copies were sent to the General Land Office in Washington, where this information was posted on the tract books, which we have in our office today, and of course this information was also posted on the local land office tract books. There were two sets of tract book. Also at the end of the month, the receiver submitted a docket which showed the payment for lands in his particular district, these lands of course being identified by legal description, the name and the payment.

Q. When you say the receivers received the money and the register issued the certificate—

A. Yes.

Q. —you're speaking of lands which a person or persons would have purchased?

A. Subject to sale, true.

Q. And the purchase money would have been paid to the receiver?

A. Yes.

Q. And there you're talking about public domain land?

A. Yes.

Q. All right. Are you aware of any lands which were claimed by private individuals at the time of the Louisiana Purchase?

A. The tract books do not reflect any claims for lands in Horn, Petit Bois or Ship Island.

Q. Is the method of purchase from the receiver and the certificate from the register the only method by which an individual could have obtained title to lands included within the Louisiana Purchase at this particular time?

A. It's a possibility of a private bill, private act passed by Congress. That would be the other way.

Q. Would that be the only other way? That is by private bill, which means I guess some special legislation concerning a particular individual for a particular piece of property?

A. That's correct.

Q. And then the other method would be through the purchase from the registers and receivers?

A. That's right.

Q. Could you give us an example or an instance pertaining to the special legislation method?

A. Well, there have been occasions when this has happened and these claims can be found in a Synoptical Index of Laws and Treaties that was published around 1851, I think at the request of the Senate, and this index, Synoptical Index lists the special acts plus other statutes that were passed in the period, about a 50 year period—53 year period—from the late 1700's to about 1850. This is one of the indexes.

Q. That index would contain information pertaining to these special pieces of legislation?

A. It would identify the legislation and where to find the volume and page of the statutes.

Q. But there again, you're talking about legislation directly pertaining to a specifically named individual and a specifically identified piece of property?

A. That's right.

Q. Mr. Dorasavage, over the course of your many years of experience with the Government Land Office, have you ever experienced situations where the tract books were inaccurate or incomplete?

A. There have been occasions when the numbers could have been juxtaposed. For instance, the tract book could read the case file number being 69 when it was 96, a clerical error or something like that; however, these errors—there are such a network of records that can zero in on that particular number. For instance, all one would have to do is refer to the local land office plat of survey where that number would be posted, and it would be correctly identified as 69.

Q. Have you ever run into situations where disposition of certain lands for one reason or another did not get properly recorded in the tract book?

A. There have been occasions where there hasn't been a recording in the tract book, but again, in checking with the local land office tract book, checking with these supportive documents, the local land office plat, checking with the state, the state's records, checking with the county recorder, these are techniques that are used to actually identify whether

or not there was an entry, you know, against that particular tract.

Q. So there have been occasions where for whatever reason the information did not get recorded on the GLO tract books, but you had means and methods of cross-checking that with other offices to identify the property and answer whatever question might be raised at that time?

A. Not only that, but we had the local land office tract books, for instance, for the State of Mississippi, in our office, the State of Alabama in our office, so we actually had both tract books and we could take a fast check on that. We have the local land office plats at the cardographic section of the Archives. We could check on that.

Q. Now, you've made several references to the local land office. What do you mean by local land office?

A. The main office was identified as the General Land Office, and this office is usually in Washington. This is where the title documents are recorded. Land offices are satellite offices. There were quite a few of them opened up throughout the different states, and the purpose was to dispose of the land, and when this was done they were closed. In other words, they were satellite offices. These are actually the offices that sold the lands, and they had certain jurisdictions, certain areas.

Q. Was there a local land office in Mississippi in 1803?

A. To the best of my knowledge, there were about five or six offices in the State of Mississippi. As to the particular dates that they opened, I don't know,

but I have that information, the openings and closings of those various offices and their areas of jurisdiction.

Q. Beginning sometime after 1803?

A. Beginning after 1803.

Q. Would there have been several different land offices which would have had the responsibility of maintaining records pertaining to the southern part of the State, including these islands?

A. Could you repeat that question, please?

Q. All right. You stated that since 1803, there have been several local land offices within the State of Mississippi that opened and closed at various and different times, which you don't recall at the moment, but—

BY MR. HERMAN: Excuse me. I don't think he said since 1803; he said sometime after 1803.

Q. All right, after 1803. My question to you is was there more than one local land office which would have had responsibility for land records dealing with lands in the southern part of the State, including Horn, Petit Bois and Ship Islands?

A. To the best of my recollection, you had the office at Augusta, you had the office at Jackson in those early years covering those lands in the south-eastern part of Mississippi.

Q. All right, and you don't know offhand when these particular offices opened or closed?

A. No, but I do have that information. They opened and closed at various times. Some offices were merged into other offices.

Q. Do you know the procedure by which the records were transferred from one local office to the other and then ultimately to the General Office in Washington?

A. If the records of the tract books in one office—if this particular office closed, the tract books were then sent to the next office that encompassed that particular area. In other words, if the area of jurisdiction of a particular land office covered just so much territory and most of the lands were sold in that territory, it was useless to keep that office open, and the records in that office were sent to another office that would enlarge its area of jurisdiction. And when they finally closed the records, the tract books were sent to Washington and kept in the General Land Office.

Q. Are you aware of any instances where the land records developed at the local land office level were destroyed or misplaced prior to being sent up to the Washington office?

A. I'm not aware of any situation like that.

Q. Do you know whether or not the GLO Office in Washington has complete sets of records compiled by the local land offices which would have had jurisdiction of these islands?

A. We have the tract books that cover those particular townships and ranges. Yes, we have a set of tract books which would show disposals for those islands.

Q. Are those complete sets?

A. Complete sets of GLO tract books?

Q. Yes, sir.

A. Yes.

Q. Do you have any knowledge pertaining to the method by which the registers and receivers prepared reports and how often they submitted the reports to higher authorities?

A. The register and receiver would send a monthly report to the General Land Office indicating the sales, the monies taken in, identify the case number and what-have-you, and that would be submitted monthly along with the case files, the copy of the receipt and the copy of the certificate.

Q. Mr. Dorasavage, with regard to the land which is the subject of this lawsuit, specifically what records or files did you or any of your employees review to determine the status of the title to those lands?

A. The General Land Office tract books, which is one of the main categories; the local land office tract book; the indexes of private land claims; the local land office plats of survey; the monthly register and receiver's report; the docket index of private land claims in the State of Mississippi; the patent office index for private land claims in Mississippi; the Synoptical Index of Laws and Treaties covering the period from the late 1700's to 1850; The Grassroots, which is a compendium of private land claims that were noted in Gales and Seaton, which of course consist of eight volumes of abstracts and ledgers of private land claims; a three volume index of claims submitted to Congress that was published by the Genealogical Society for the years late 1800's to approximately 1850—late 1700's, pardon me, to 1850.

Q. Late 1700's?

A. Yes.

Q. Okay.

A. An index of donation and private land claim patent records covering 28 volumes of patents; private land claim files that are located in the main Archives building; plats of survey; some other documents that are in a miscellaneous letter file pertaining to Horn, Ship and Petit Bois Islands that are on file at the National Archives and Records Service; requests for files and status from the State office, State of Mississippi. I do have a list of records checked. This appears to be the list. There could be one or two omissions. I have the list itemized.

Q. Could you make that list available to us?

A. [Obtains list] And also an index inventory of land entry papers of the General Land Office prepared by the National Archives in 1949. [Tenders list to Mr. Martin]

Q. You've got one entry here, 1888 letter from Land Office Register. Do you recall specifically what that was?

A. Yes, it was a request from the Commissioner to the Register at the land office at Jackson, as to what his records show for Horn Island, and the report was that the records showed nothing as far as Horn Island is concerned, but he has the plats of survey. I have a copy of that document.

BY MR. HERMAN: That document was submitted in the group of documents that we filed with the Court.

Q. Mr. Dorasavage, the listing which I presume is in your handwriting—you prepared this list?

A. Yes.

Q. On the back of it it has what appears to be several dates with initials out beside. Could you tell us what this is?

A. Yes, these are some of the dates where the General Land Office was transferred to different buildings.

Q. All right.

A. In 1839, the Land Office was located in the Treasury Building; in '55—

Q. 1855?

A. 1855, it went to the Patent Office Building; 1900 it moved to the General Land Office Building; in 1917 the office moved to what is known as the GSA Building today; in 1937 the office was moved to the New Interior Building; and in 1966 it moved to Silver Spring, in 1979 it moved to Alexandria.

Q. And each of those moves necessitated the moving and transferring of all the documents?

A. Yes.

Q. Including the tract books, patent books and so forth?

A. Yes.

Q. Do you have any knowledge as to any records being misplaced or lost during one or more of any of these moves?

A. No, we have the records to the best of my knowledge. All the books are identified by volume numbers, one, two, three, four, five.

Q. All right. With regard to these several items of records which you have indicated were reviewed, I

believe you earlier testified that the GLO tract books are located in your office, in the GLO office?

A. Yes.

Q. Would the answer be the same for the local land office tract books?

A. The local land office tract books are at the National Archives and Records Service today.

Q. What about the indexes of private land claims?

A. Is that all you have, indexes of private land claims?

Q. Yes.

A. There are all sorts of indexes; the docket index?

Q. I attempted to write down while you were listing these, and what I've got written down is indexes of private land claims. Is there more than one index that you're referring to?

A. We have a computerized index called Grassroots of America. This is an index to the American State Papers, Gales and Seaton edition.

Q. Where is that located?

A. In my office.

Q. So the third item that you mentioned a while ago, the indexes of private land claims, you are meaning several different sources of materials, one of which is The Grassroots?

A. One is The Grassroots, another was The Index to Private Land Claims in Mississippi, which is kept in the Patents Division.

Q. Patents Division of GLO?

A. Of GLO.

Q. Is that in the Alexandria office?

A. Yes.

Q. All right. The fourth item I've got here is local land office, and that's all I've got written down here, but what did you mean by that?

A. Local land office plats of survey.

Q. And where are they located?

A. At the Car[t]ographic Section of the National Archives.

Q. What about the monthly register and receiver reports?

A. Those reports are at the National Archives and Records Service.

Q. Docket index of private land claims in the State of Mississippi.

A. Those are located in the Patent Section of our office at Eastern States.

Q. And then Patent Office Index of Private Land Claims in Mississippi.

A. Repeat that?

Q. Patent Office Index of Private Land Claims in Mississippi.

A. That's in the Patent Section where the private land claims are identified by name.

Q. And Synoptical Index of Laws and Treaties from late 1700's to 1850.

A. That is in my office. That index was prepared under the direction of the Secretary of the Senate.

Q. Three volume index of claims submitted to Congress published by the Genealogical Society.

A. It's a digested summary containing an alphabetical list of private claims presented to the House of Representatives with reference to the journals, reports, bills from the first to the thirty-first Congress, compiled by order of the House of Representatives, published by the Genealogical Publishing Company of Baltimore.

Q. Where is that located?

A. In my office.

Q. Index of Donations and Private Land Claim Records, 28 volumes. Where is that located?

A. That index is located in the Patent Record Section of Eastern States office.

Q. Private Land Claim files located in main Archives Building. Okay, that would be main Archives Building. Plats of survey.

A. That would be in the Eastern States office.

Q. Other documents and miscellaneous letter file.

A. That would be at the National Archives and Records Service.

Q. Request for files and status from State of Mississippi. That would have been the documents you received from the Secretary of State's office?

A. Yes.

Q. Index and Inventory of Local Entry Papers at GLO, prepared by National Archives in 1949?

A. It's a publication. I have a copy in my office.

Q. When were these several documents reviewed?

A. I reviewed all of these documents the past month.

Q. Sir? Within the past month?

A. Within the past two or three weeks. Not all of them. I've had the land law examiner specialist examine the documents at the Archives in Washington, the local land office tract books at the National Archives and Records Service and the local land office plats at the Cardographic Section.

Q. And what is his name?

A. Tim Hensley.

Q. And when did he perform his search?

A. The past week.

Q. All right. Now, he would have searched the records at the Archives?

A. Yes, in Washington.

Q. Did he search anywhere else?

A. At the National Archives and Records Service at Suitland, Maryland.

Q. All right.

A. And the Car[t]graphic Section of the National Archives on Pickett Street in Alexandria.

Q. All right, those two places?

A. Three places.

Q. Okay, National Archives and the Records Services Center are two different things—

A. Yes.

Q. —but they're both located at Suitland?

A. The National Archives and Records Service is located at Suitland.

Q. All right. Now, is that one entity, or are those two—

A. It's one building.

Q. All right, but they're two separate entities or organizations that just happen to be located in the same building, is that right?

A. The main Archives building is in Washington, and the satellite office is out there. They can't store all their records downtown.

Q. So what you're saying is Mr. Hensley reviewed the records at the National Archives in Washington, D.C., and then the National Archives in the Service Center building, which is at Suitland?

A. He reviewed the private land claim documents at the National Archives in Washington and he reviewed the local land office tract books at the National Archives at Suitland.

Q. And then he checked also at the Cardographic Section, which is in Alexandria?

A. The local land office plats.

Q. All right, and then you reviewed the tract books and the patent books at your office?

A. Yes, the original General Land Office books.

Q. All right, and you would have performed that review within the last couple of weeks?

A. Last two-three weeks.

Q. Did anyone else assist you in performing these reviews—yourself and Mr. Hensley?

A. That's right.

Q. And Mr. Hensley is a land law specialist in the GLO office at Alexandria?

A. He is a land office examiner in my office—

Q. All right.

A. —specializing in private land claims.

Q. And what is the conclusion of yours and Mr. Hensley's review with regard to Petit Bois Island, for instance?

A. That there were no disposals, no private land claim disposals for Petit Bois Island or Ship Island and for Horn Island.

Q. Did you discover any private claims having been made for any portion of any of those islands?

A. There were claims—there was a claim by the heirs of Farmar in the name of Sheffield for Horn Island, but the claim was denied—lack of evidence and no inhabitation or cultivation.

Q. And what is the source of that conclusion?

A. The Commissioner's abstract, the original which is in the National Archives in Washington, and the publication in Gales and Seaton of that abstract.

Q. Did you find any other private claims?

A. No, sir.

[SHORT RECESS]

Q. [MR. MARTIN] Mr. Dorasavage, in addition to the documents that you have listed, have you had occasion to review any census records that would pertain to the islands?

A. I have not reviewed any census records.

Q. Are you aware of whether or not there may have been people actually living on those islands say from 1800 to 1950?

A. The records that I examined, the official General Land Office records, which would reflect any entry or purchase by any person for public domain land, did not reflect any other information in addition to what I've given you. In other words, census records would actually have nothing to do with the purchase of public domain. Public domain, of course, is disposed of by authority of a public land law or a statute.

Q. And would your answer be the same with regard to review of any local ad valorem tax records to see whether or not any of the properties within this lawsuit were being taxed to private citizens?

A. Any person who would be interested in acquiring title to a piece of public domain would have to file an application in the local land office, and of course that application would have to be based on a particular public land law—for instance, The Cash Act, the Credit Act, the Homestead Act. There are over 5,000 land laws, and the basis for his acquiring any portion of the public domain would have to be in accordance with those land laws.

Q. That wasn't my question. My question is did you make any review of any records which would indicate private citizens paying local, county and state ad valorem taxes on portions of these islands?

A. No.

Q. You're not aware of whether that is a fact or not?

A. I didn't—I would have no occasion to do anything like that.

Q. As I mentioned to you at the beginning of this deposition, I represent the Beggerly family. Have you had occasion to become familiar with the Beggerlys' claim in this matter?

A. No, I have not.

Q. Have any of the attorneys involved on behalf of the Government discussed with you the claim of the Beggerlys?

A. No, they haven't.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

Civil Action No. S79-0338(R)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDREW J. ADAMS, ET AL., DEFENDANTS

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

GEORGE L. PHILLIPS
United States Attorney

L. K. TRAVIS
Assistant United States Attorney
Post Office Box 2091
Jackson, Mississippi 39205

MARGARET M. McMAHON
RALPH GLEN ESKITE
STEVEN A. HERMAN
Attorneys, Department of Justice
Washington, D.C. 20530

OF COUNSEL:

JUDITH DEDMON
Assistant Regional Solicitor
Department of the Interior
Atlanta, Georgia 30303

INTRODUCTION

Plaintiff United States sues to quiet title to various lands on three islands off the coast of Mississippi. In support of its option for summary judgment plaintiff will show: (1) that its ownership commenced in 1803 through the Louisiana Purchase; (2) that no patents of any kind have ever been issued by the United States to these lands; and (3) that no land grants had been issued by France, Spain, or Britain to any of the defendants or their predecessors in interest either before or after the Louisiana Purchase.

Additionally, plaintiff will dispose of various claims based on the Color of Title Act, 43 U.S.C. 1068, *et seq.*, the Swamp Lands Act, 43 U.S.C. 892, and on such theories as "lost grant," estoppel, laches, and waiver. Appendix 3 is a list of defenses as asserted by each defendant.

In short, the history of these islands demonstrates that at no time did the United States relinquish its title to the lands in issue, but rather always exercised dominion and control over them. Most significantly, the record[1] before the Court indicates that the lands

[1] The record on which the United States relies for its motion for summary judgment is cited in this brief and comprises a part of the massive compilation of documents filed with the Clerk of the United States District Court, Biloxi, Mississippi. "Exhibits" refers to Exhibits attached to the United States Motion for Summary Judgment, hereinafter, Exh. ____; Appendices are attached to this memorandum, hereinafter, Appendix ___, and documents in the record of this case, filed by the United States in compliance with the orders of this court regarding discovery are designated herein as "Docu. No.". Finally, exhibits of defendants also filed of record pursuant to discovery orders are labeled "Exh. of Beggerly, 15", etc.

were acquired from France in 1803 (App. 5) and that, beginning in 1847, all of the lands in question were withdrawn from entry for military purposes by Executive Order of August 30, 1847 (App. 1). Although portions of the islands were open to patent at various times after 1847, in fact no patents on the lands that are the subject of this lawsuit were ever issued out of the United States. These lands were reserved *in toto* in 1925 by Executive Order 4626 of July 3, 1925 (App. 2) and in 1958 by Public Land Order No. 1636 of May 14, 1958, 23 Fed. Reg. 3388 (May 20, 1958).

The record also demonstrates that throughout the period since the first surveys of the islands were made in 1847 (Exh. 3), the lands at issue here were in continuous federal use for: military or lighthouse purposes, a chemical warfare station, a Coast Guard target range and/or for other military purposes during World War II and thereafter as a wildlife refuge. Exhibit 4, Executive Order of July 7, 1852; Executive Order of September 3, 1900; Executive Order of April 12, 1906; Executive Order 5562 of February 26, 1931; Executive Order No. 10355 of May 26, 1952.

Based upon this record, as more fully discussed below, and the law, the United States is entitled to summary judgment in its favor.

I. THE LANDS IN QUESTION HEREIN PASSED TO THE UNITED STATES AS PART OF THE LOUISIANA PURCHASE UNDER THE TREATY OF PARIS OF 1803.

On two occasions the Supreme Court of the United States has determined that certain lands, including the three islands at issue in this lawsuit, came into the possession of the United States through the Louisiana Purchase. Nothing in defendants' submissions upsets or alters the binding nature of those Supreme Court rulings.

In 1829 Chief Justice John Marshall found that the portion of the State of Mississippi south of the 31st parallel, an area which includes Horn, Ship, and Petit Bois Islands, passed to the United States as part of the Louisiana Purchase under the Treaty of Paris in 1803. *Foster and Elam* v. *Neilson*, 2 Pet. 253 (1829); *United States* v. *Louisiana*, 363 U.S. 1, 81 (1960). The Louisiana Purchase does not contain specific land descriptions of the territory transferred from France to the United States (Document No. 09473) and *Foster* was an early case in which a determination of the precise boundaries was required for the Court to resolve the litigation before it. In *Foster*, Justice Marshall reviewed the diplomatic history involving the Louisiana and Florida territories, and various claims of and disputes and treaties between Britain, France, Spain and the United States. He concluded that the position of the United States, which was that the land between the Iberville and Perdido Rivers, which includes Ship, Horn and Petit Bois Islands, did pass to the United States from France through the Louisiana Purchase. (See map attached as App. 5)

Marshall acknowledge[d] that the United States' interpretation was disputed by Spain. However, he explained why the Court would respect and adhere to the diplomatic and political position taken on behalf of the United States by the President and the Congress:

> The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.
>
> *We think then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed.* (Emphasis added)
>
> 2 Pet. at 307

Marshall then recited all of the actions taken by the President and the Congress asserting United States sovereignty over the area, and concluded by stating:

> After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it

claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. *A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature.* Had this suit been instituted immediately after the passage of the act for extending the bounds of Louisiana, could the Spanish construction of [*sic*] the treaty of St. Ildefonso have been maintained? Could the plaintiff have insisted that the land did not lie in Louisiana, but in West Florida; that the occupation of the country by the United States was wrongful; and that his title under a Spanish grant must prevail, because the acts of congress on the subject were founded on a misconstruction of the treaty? If it be said, that this statement does not present the question fairly, because a plaintiff admits the authority of the Court, let the parties be changed. If the Spanish grantee had obtained possession so as to be defendant, would a Court of the United States maintain his title under a Spanish grant, made subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St. Ildefonso was right, and the American construtions wrong? Such a decision would, we think, have subverted these principles which govern the relations between the legislative and judicial departments, and mark the limits of each. *Id.* at 309. (Emphasis added).

Marshall's findings were reaffirmed one hundred and thirty-one years later in another Supreme Court decision, *United States* v. *Louisiana*, *supra*, a case involving a dispute between the United States and the States of Mississippi, Alabama, Louisiana, Texas, and Florida over rights to lands, minerals and other natural resources underlying the waters of the Gulf of Mexico. The Court rejected Mississippi's claim to a three league seaward landing relying in part on Marshall's analysis in *Foster*. It held without ambiguity that:

> [T]he portion of the State of Mississippi south of the 31st parallel passed to the United States as part of the Louisiana Purchase under the Treaty of Paris in 1803 and not as part of West Florida under the Spanish Treaty of 1819. 363 U.S. at 81.

Defendants' contention that the United States did not receive the islands in question from France through the Louisiana Purchase is wrong. Indeed, the matter is really not one open to dispute at this time; it was settled over 150 years ago. As shown by the Supreme Court decisions discussed above, that very contention has been rejected by the judiciary, the Executive and the Legislative branches of our government from the earliest days of our nation. Thus, this Court has no alternative but to reject it also.

II. THERE WERE NO FOREIGN LAND GRANTS EVER ISSUED ON THE SUBJECT LANDS

In order to settle private claims to lands becoming part of the United States, Congress has periodically established various commissions to adjudicate the merits of the claims. See, e.g., Act of April 25, 1812, 2

Stat. 713, *Beard* v. *Federy*, 70 U.S. 478, 486-87 (1865); Act of March 3, 1851, 9 Stat. 631. Once a claim has been favorably adjudicated and approved by Congress, a patent can be issued. A patent is a deed of the United States evidencing title. As the Supreme Court stated in *Beard* v. *Federy*, *supra*, 70 U.S. at 492: "This instrument is, therefore, record evidence of the action of the government upon the title of the claimant."

Under the Act of April 25, 1812, 2 Stat. 713, a commission was set up to ascertain French, British and Spanish grants on the territory which included the lands at issue in the present case.[2] The Act required preparation of a report by the commission to be submitted through the Secretary of the Treasury to Congress for final determination. Secs. 7, 5, Act of April 12, 1812, 2 Stat. 713. Congress then was to make a final determination by passing legislation approving specific claims if they were found to be valid. By Act of May 11, 1820, 3 Stat. 528, Congress confirmed those claims favorably reported by the Secretary of the Treasury.[3] Following congressional action the local land offices issued certificates and the general land office in Washington issued patents. 3 Stat. at Large 523 at 532.

---

[2] On April 25, 1812, Congress passed, "An act for ascertaining the titles and claims to lands in that part of Louisiana which is east of the river Mississippi and island of New Orleans covering claims to lands south of Mississippi territory, east of Mississippi River and the island of New Orleans, and west of the River Perdido." The Act divided the lands into two land districts, one of which was at Jackson Courthouse Established under the Later Act of 1820, *infra*.

[3] Approval was made under the Act of April 25, 1812.

With regard to the lands at issue in this case, the record is conspicuously blank; there is no favorable commission report, no congressional approval, and no patents. In sum, there is no record of any defendant or predecessor in interest having a valid patent based on a foreign land grant.

III. NO PATENT ON THE SUBJECT LANDS WAS EVER ISSUED OUT OF THE UNITED STATES

The United States title to the lands in issue derives from the Louisiana Purchase of 1803 and title to land owned by the United States can be divested only by Act of Congress under Article IV, Sec. 3, Cl. 2 of the Constitution which provides:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

The Supreme Court has held this power of Congress to be plenary. "The power over the public land thus entrusted to Congress is without limitations . . ." *United States* v. *Gratiot*, 14 Pet. 526, 537 (1840); *Alabama* v. *Texas*, 347 U.S. 272, 273 (1954); see also *United States* v. *San Francisco*, 310 U.S. 16, 29-30 (1940). The means of divesting the United States of its title is by United States patent. The patent operates as a deed conveying all the interest that the United States possesses as to the land, *Beard* v. *Federy*, *supra*, and is the highest evidence of title. *United States* v. *Stone*, 69 U.S. 525, 535 (1864). Numerous acts of Congress provide diverse grounds

for the issuance of patents (e.g., Homestead acts, Swamp Lands Act, Desert Lands Act) and the conditions which must be met before a patent can be issued. The patent document itself reflects on its face the Act of Congress under which it is issued. Once issued, the patent is recorded among the land records retained by the Bureau of Land Management, Department of the Interior. 43 U.S.C. 6.

The Court presently has before it a documentary record of over 10,000 pages. It is composed of documents submitted by plaintiff and all of the defendants. There is not a single patent issued by the United States to any of the defendants or their predecessor's in interest on the lands in question in this suit. Under these circumstances the only reasonable conclusion this Court can reach is that the United States has never issued any patents to any of the lands in question.

* * * * *

CONCLUSION

For all of the reasons stated above summary judgment quieting title in the United States to the lands in issue should be granted.

Respectfully submitted,

GEORGE L. PHILLIPS
United States Attorney

By: /s/ L. K. TRAVIS
L.K. TRAVIS
Assistant United States Attorney
Post Office Box 2091
Jackson, Mississippi 39205

/s/ STEVEN A. HERMAN
RALPH GLEN ESKITE
MARGARET M. MCMAHON
STEVEN A. HERMAN
Attorneys, Department of Justice
Washington, D.C. 20530

OF COUNSEL:

JUDITH DEDMON
Assistant Regional Solicitor
Department of the Interior
Atlanta, Georgia 30303

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

Civil Action Number: 1:94cv264RR

CHRIS W. BEGGERLY, ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: July 12, 1995]

MOTION TO AMEND

Come now the Plaintiffs, Chris W. Beggerly, et al., ("the Beggerlys") who file this, their Motion to Amend as follows:

1. On June 1, 1994, the Plaintiffs filed a complaint in this action.

2. There is now pending before the Court a motion to dismiss and cross motion for summary judgment which have been fully briefed. During the briefing process, the Plaintiffs cited as part of their jurisdictional basis the Quiet Title Act and the Tucker Act which they failed to cite in their jurisdictional allegation in their complaint. Both parties have briefed the applicability of these statutes to the present action in the briefs now pending before the Court.

3. The Plaintiffs request the Court to permit them to amend their complaint to add to their jurisdictional allegation, Paragraph 1, both the Tucker Act, 28

U.S.C. 1346 and 1491, and the Quiet Title Act, 28 U.S.C. 2409a. If permitted, the requested jurisdictional allegation, Paragraph 1 of the Complaint, will read as follows:

> This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution, laws and treaties of the United States; and pursuant to the Quiet Title Act, 28 U.S.C. 2409a and the Tucker Act, 28 U.S.C. 1346 and 1491.

4. The requested amendment is timely, will not cause prejudice and is authorized by both Federal Rules of Civil Procedure 15 and 28 U.S.C. § 1653 which states that: "defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

WHEREFORE, for the foregoing reasons, the Plaintiffs respectfully request that they be authorized to amend their complaint as requested.

Dated this, the 11th day of July, 1995.

Respectfully submitted,

CHRIS W. BEGGERLY,
JAMES R. BEGGERLY,
CLARK M. BEGGERLY, JR.,
VELMA B. GARNER,
SUZANNE REED
AND DAVID REED

By Their Attorneys
WATKINS LUDLAM & STENNIS

By: /s/ ERNEST G. TAYLOR, JR.
ERNEST G. TAYLOR, JR.

Ernest G. Taylor, Jr. (MB #7451)
Jim B. Tohill (MB #8234)
Robert E. Hauberg, Jr. (MB #8958)
Robert M. Arentson, Jr. (MB #1612)
WATKINS LUDLAM & STENNIS
633 North State Street
Post Office Box 427
Jackson, MS 39205-0427
(601) 949-4900

(6)

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No. 97-731

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNITED STATES OF AMERICA, *Petitioner,*

v.

CHRIS W. BEGGERLY, ET AL., *Respondents.*

On Writ of Certiorari To
The United States Court of Appeals
For the Fifth Circuit

Brief of Respondents
Chris W. Beggerly, James R. Beggerly, Clark M. Beggerly, Velma B. Gardner, Suzanne Reed, and David Reed

---

Nancie G. Marzulla
Christopher J. Oberst
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
202-822-6770

Ernest G. Taylor, Jr.*
Robert M. Arentson, Jr.
WATKINS LUDLAM WINTER & STENNIS P.A.
633 North State Street
Jackson, MS 39202
601-949-4900

*Counsel of Record

March 25, 1998

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QUESTIONS PRESENTED

1. Whether the district court had ancillary jurisdiction to hear this case?
2. Whether the Fifth Circuit correctly held that the 12-year statute of limitations contained in the Quiet Title Act was equitably tolled until a mistake or misrepresentation was discovered?
3. Whether the Fifth Circuit correctly held that respondents had title to the subject property?

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of 28 U.S.C. § 2409a and Federal Rule of Civil Procedure 60(b) are set forth in the appendix to petitioner's brief. The Fifth Amendment to the United States Constitution states in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

1.) In 1950, Clark M. Beggerly, Sr., respondents' predecessor-in-interest, purchased 729 acres of land on Horn Island, a Mississippi barrier island.[1] After the purchase, the Beggerly family's ownership was generally known and recognized by the local residents, the county, state and federal governments and they continuously paid property taxes on the land. J.A. 86.[2]

In September 1971, the Department of Interior offered to purchase respondents' land for inclusion in a national park.[3] However, no sale was ever finalized. J.A. 89.

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[1] Respondent James R. Beggerly is sole owner of four lots that constitute 626 acres of the subject property. All respondents have joint ownership of the remaining 103 acres of the subject property.

[2] Petitioner states that "In this case, for example, the United States has openly acted as owner of Horn Island since 1803 . . ." Pet. Brief at 26. However, petitioner cites no portion of the record to justify this assertion – a claim which is belied by petitioner's admission that, "in 1972, the National Park Service began appraising lands within the boundaries of GINS, including some lands on Horn Island, as an initial step toward acquisition of properties." Pet. Brief at 5. Petitioner likewise fails to explain the necessity for filing the *Adams* action against approximately 200 Horn Island landowners.

[3] On January 8, 1971, Congress adopted legislation authorizing the Department of Interior to develop a new federal park, the Gulf Islands National Seashore Park. The purpose of the Act was to protect and preserve the natural, historic and recreational values of certain barrier islands in the Gulf. Pub. L. 91-660; 84 Stat. 1967 (codified at 16 U.S.C. § 459h to 459h-10). It included three Mississippi barrier islands, Horn, Petit Bois, and Ship Islands.

2.) In September 1979, the government filed a quiet title action in the United States District Court for the Southern District of Mississippi, claiming that the respondents' title was void. *United States v. Adams*, Civil Action No. S79-0338 (R). J.A. 38. In the complaint, the government asserted that the United States had acquired the property as part of the Louisiana Purchase in 1803; that the United States had never issued a patent, nor had it otherwise conveyed the property and that respondents' claims to title were without any right whatsoever and constituted a cloud on the government's title. J.A. 43.

In early 1982, the government filed a summary judgment motion and supporting brief which stated that "no land grants had been issued by France, Spain, or Britain . . . before or after the Louisiana Purchase." J.A. 228. This introductory statement was followed by a detailed argument with the following heading: "There Were No Foreign Land Grants Ever Issued On the Subject Lands." J.A. 233-35.[4]

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[4] In fact, at the time that these statements were made, the government had not researched the files in the National Archives for foreign land grants even though the government knew that the National Archives was a likely place to find such grants. Michael Knipfing, Deputy Chief, Branch of Lands and Title Adjudication in the Bureau of Land Management, J.A. 187-89, testified in his deposition given on June 29, 1982, that he had recommended to the government attorneys that research be done in the National Archives in Washington, D.C. and that as of the date of the

In a subsequent deposition given on October 14, 1982, Mr. William Dorasavage, Chief, Branch of Lands and Title Adjudication, Bureau of Land Management, testified that the week before his deposition, which was given on October 14, 1982, he had a land law examiner specialist examine the documents in the National Archives in Washington along with two other archives in the D.C. area and that as a result of his research, he had determined that there were no private land claim disposals on Horn Island. J.A. 222-24.

During the pendency of the government's quiet title suit, respondents made a diligent effort to find a valid patent or grant to support their title. J.A. 108. At the same time, the government consistently misrepresented to the respondents and the court that there was no grant or patent validating the respondents' title. J.A. 107. Unable to find a grant or patent, and faced with the court's admonition that without it they would lose, J.A. 108, in December 1982, on the eve of trial, the respondents were forced to accept a nominal settlement of approximately $200 per acre, an amount that

deposition, no one had in fact done research for land grants there. J.A. 192, 193-94.

fell short of the true market value of their property.[5] J.A. 109.

3.) Although they had lost title to their property, respondents continued to search for a patent. They contacted state, local, and federal officials and filed Freedom of Information Act requests. J.A. 68. As a result of their research, they concluded that the most likely source of a grant would have been from the Spanish government during the latter part of the Eighteenth Century when Spain had sovereignty over the area. Having reached this conclusion, respondents hired a genealogist in Washington, D.C. to research records in the National Archives. J.A. 92.

After reviewing over seventy-five files, in 1991 the genealogist finally found what the government could (or would) not, the Boudreau Grant in the Civil Records Branch of the National Archives in Washington, D.C.. J.A. 96. That land grant had been presented to and recorded by the United

[5] Soon after filing the action to quiet title to Horn Island, the government filed a condemnation action to acquire Petit Bois Island located about two miles east of Horn Island for inclusion in the Gulf Island National Seashore Park. After a valuation hearing, the court ruled that the fair market value of the Petit Bois property was $8,000 per acre for the surface rights to the land and $6,000 for the mineral rights to the land. J.A. 109. *United States v. 717.42 Acres of Land, More or Less Situated in the County of Jackson, State of Mississippi and Petit Bois, Inc., et al.*, Cause No. S80-0450 (N), United States District Court for the Southern District of Mississippi.

States government in 1816 and it has remained in the custody and control of the government ever since. J.A. 115.

Upon discovery of the land grant, respondents, acting on their own and without legal counsel, promptly contacted the Department of Interior requested that their title be recognized and that a patent be issued. J.A. 69. The government wrote a ten-page letter, prepared with the assistance of the Solicitor's office, advising that the "Boudreau Grant" was not valid because it had not been confirmed.[6] J.A. 73-83.

4.) Having no other recourse, respondents filed the instant lawsuit in federal district court on June 1, 1994, just three years after having discovered the land grant that the government mistakenly told the court in its quiet title action in 1979 did not exist. The instant lawsuit requests that the court set aside the 1982 settlement agreement and consent judgment that was obtained by the government and entered on an erroneous statement of fact. The district court dismissed respondents' complaint, and denied their motion for summary judgment, reasoning that the court lacked

[6] The government's representation that the "Boudreau Grant" had to be confirmed to be valid was a misstatement of law. *See United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86-87 (1833), which states that a complete and final Spanish grant was valid and binding without confirmation.

jurisdiction to hear the case pursuant to either a Rule 60(b) motion or an independent action at equity. Pet. App. 40a-41a.

5.) The U.S. Court of Appeals for the Fifth Circuit reversed. The court below concluded that the district court had jurisdiction to hear respondents' claims as an independent action in equity, because that action which had been filed in the same court that rendered the original judgment, was really a continuation of the original action for purposes of subject matter jurisdiction. Pet. App. 4a-5a. The Court of Appeals also held that respondents should have been permitted to amend their complaint to include a claim under the Quiet Title Act, 28 U.S.C. § 2409a, holding that the time-ban was equitably tolled in instances where "the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." Pet. App. 9a-10a. Finally, the Court of Appeals set aside the judgment in the *Adams* litigation that had been based on a mistake of fact. Pet. App. 6a-9a. Accordingly, the Court of Appeals remanded the case to the trial court with instructions to quiet title to the subject property in the respondents. Pet. App. 10a.

SUMMARY OF THE ARGUMENT

At its core, this case presents one critical issue: When a court decree wrongfully vests title to land in the United States as a result of misrepresentations and misstatements of fact, is that court powerless to remedy that miscarriage of justice? Traditional legal principles support the conclusion that the United States should not retain legal title to land which it does not rightfully own. Petitioner here argues for the abandonment of those well-established rules of law, urging instead a barrage of technical arguments which are both inequitable and just plain inconsistent with recent decisions of this Court and of most other courts that have looked at these issues. Respondents argue, in contrast, that no legitimate reason has been put forward for destroying the concepts of independent actions, equitable tolling, due process and principles of international law which have served our system of justice well over the years.

First, petitioner argues that Rule 60(b) provides the exclusive remedy for setting aside a judgment obtained by misrepresentation or mistake of fact, a position directly contrary to the cases (both before and after the adoption of Rule 60(b)) that employ the "independent action" remedy to invoke the ancillary jurisdiction of the original court to reform an erroneous judgment. (*See, e.g., Jones v. Anderson-*

Tully Co., 722 F.2d 211 (5th Cir. 1984); *Pacific R.R. of Missouri v. Missouri Pacific Ry. Co.*, 111 U.S. 505 (1884)). Petitioner's position would eliminate this traditional and admittedly narrow but useful ameliorative procedure for all private litigants as well as the government. The result would be a rule that a misrepresentation or mistake, concealed or undiscovered for more than a year (the Rule 60(b) limitation), would be beyond all power of the court to remedy, regardless of the injustice involved. Petitioner presents no rationale for rejecting half a century of post-Rule 60(b) jurisprudence; accordingly, its petition for wholesale change in the law of ancillary jurisdiction to reform erroneous judgments should be rebuffed.

Similarly, petitioner's claim of exemption from traditional principles of equitable tolling of the statute of limitations for fraud, mistake or misrepresentation would require this Court to overrule (or at least drastically restrict) its holding in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), that sovereign immunity does not preclude application of the doctrine in appropriate cases brought against the government. Adoption of petitioner's position would also require an explicit overruling of the Ninth Circuit's recent decision in *Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995) *vacated*, 117 S. Ct. 1103, *orig. opinion reinstated*, 113 F.3d 167 (9th Cir. 1997), specifically

rejecting the statutory and legislative history arguments put forth anew in this matter. The simple truth is that nothing in the Quiet Title Act's language or its legislative history remotely supports the claim that, once the government wrongfully asserts a title claim and thereafter obtains a judgment based on that misrepresentation, sovereign immunity creates an absolute bar to obtaining a true judgment of title. Nor does petitioner put forward any sound reason why the misrepresentation, once discovered, should be ignored by the court and the government alike, allowing the United States to retain title wrongfully obtained by negligence or trick.

Indeed, a holding which legalizes the wrongful taking of respondents' property would not pass constitutional muster. The Fifth Amendment's prohibitions of deprivation without due process, and against taking for public use without just compensation, are affronted by a legal scheme which transfers title to the United States without a fair process (*i.e.*, through misrepresentation or mistake) and without paying the rightful owner for his land. *See*, *e.g.*, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 50 (1993)(purpose of the Due Process Clause is "to minimize substantively unfair or mistaken deprivation of property.") and *Hodel v. Irving*, 481 U.S. 704 (1987)(government's taking title to fractionated interests in

property without payment of just compensation violated Fifth Amendment.).

Finally, having failed to put forward a procedural bar which would avoid the merits, petitioner sets forth a lame argument that the Spanish land grant which took this property out of the public domain in 1781 was ineffective because dictum in an earlier case stated that Sr. Galvez did not have legal authority to convey the land. Apart from the defect that such a fact (even if true) is not legal precedent—especially not with regard to different property and a case presenting different facts and documents—this Court has never treated its holdings on foreign law as binding precedent. Rather, this Court sensibly examines the law of the country (in this case, Spain), which is not a common law country and does not employ the rule of *stare decisis*, applying it to the facts of the case at bar. *Summe Corp. v California ex rel. Lands Comm'n*, 466 U.S. 198 (1984). A judicial decision on a point of foreign law does not constitute a binding precedent. *See* R.B. Schlesinger *et al.*, *Comparative Law* 88 (5th ed. 1988). Petitioner's effort to overthrow these ancient rules of law, substituting the doctrine of *stare decisis* in their stead, would do violence to at least a century of established law, creating havoc in multinational and international legal application.

In sum, respondents believe that the law is not powerless to right the wrong committed when the United States obtained title to their land by misrepresentation. The court below properly decided that, in the limited circumstances of this case (where the United States filed suit and obtained title to respondent's land by presenting false facts), no legal nicety prevents the court from correcting its error. That judgment is legally sound, common-sense—and should be affirmed.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO DECIDE THIS CASE.

A. When the United States Waived Sovereign Immunity by Filing Its 1979 Quiet Title Action, It Also Submitted Itself To Ancillary Jurisdiction of the District Court In 1994 To Correct Fraud or Mistake.

In 1979, the United States filed a lawsuit pursuant to 28 U.S.C. §1345 seeking to establish ownership of respondents' property. J.A. 38. In so doing, the United States waived its sovereign immunity with regard to all defenses and counterclaims encompassed within its own claims. *Carr v. United States*, 98 U.S. 433, 438 (1878)("when the government itself seeks its rights at the hands of the court,

equity requires that the rights of other parties interested in the subject matter should be protected."); *see also United States v. Tsosie*, 92 F.3d 1037, 1043 (10th Cir. 1996)("when the United States institutes a suit, it thereby consents . . . to the full and complete adjudication of all matters and issues which are reasonably incident thereto.") and *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967)("When the sovereign sues it waives immunity as to claims of the defendant which assert matters . . . arising out of the same transaction or occurrence which is the subject matter of the government's suit.") Since an independent action brought in the same court that rendered the judgment of an original action is a continuation of the first action and invokes the ancillary jurisdiction of that court, an independent waiver of sovereign immunity is likewise not required. *Pacific R.R. of Missouri v. Missouri Pacific Ry. Co.*, 111 U.S. 505, 521-522 (1884) (holding that where the federal court had jurisdiction of the original suit, it also had jurisdiction over a later action to set aside judgment on grounds of unfaithful conduct of officers of party to suit); *see also West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 213 F.2d 702 (5th Cir. 1954)(holding that court of equity has jurisdiction to re-open judgment in cases of mistake); *Crosby v. Mills*, 413 F.2d 1273 (10th Cir. 1969)(holding that the court has ancillary jurisdiction over action for relief from judgment in same

court regardless of the absence of diversity of citizenship); and, *Butler v. Ungerleider*, 187 F.2d 238 (2d Cir. 1951)(granting ancillary jurisdiction to suit in the same court modified original action). Ancillary jurisdiction of the court rendering the original judgment is so broad as to encompass independent actions even where subject matter or diversity jurisdiction would no longer be present for the original lawsuit. *Pacific R.R.*, 111 U.S. at 521-22; *see generally* 7 James W. Moore, *Moore's Federal Practice*, § 60.84 and Wright & Miller, § 2868 ("In an independent action for relief from a judgment, there is ancillary jurisdiction over the action despite the absence of a federal question or of diversity of citizenship or of the requisite amount in controversy.").

Even Rule 60(b) of the Federal Rules of Civil Procedure, which codifies certain equitable remedies of a court, specifically preserves the common law remedy of independent actions, relying on ancillary jurisdiction: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding." Fed. R. Civ. P. 60(b). *See also Treadway v. Academy of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1420 (9th Cir. 1986)(citing Moore's Federal Practice for the proposition that "[t]his power is one that is rooted in tradition and governed by general equitable principles."); *Herring v.*

Federal Deposit Ins. Corp., 82 F.3d 282, 285 (9th Cir. 1995)("Rule 60(b) does not grant anyone standing to bring an independent action; it merely does not restrict any standing a party otherwise has."). The Advisory Committee Notes to Rule 60 further explain that no new right of action is created by the "saving clause" of Rule 60; rather, it merely preserves "a procedural remedy . . . by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action." Fed. R. Civ. P. 60(b) advisory committee note of 1946.

Accordingly, the court below properly rejected the sterile formalism advocated by the government in favor of a rule that looks to the substance of the relationship between the original and the subsequent action. The court below held that since the United States brought the quiet title action in the first instance, it could not later object to the court's exercise of jurisdiction over a remedy (declaring the ownership of the property) the court subsequently ordered:

> We have held that an independent action filed in the same court that rendered the original judgment is a continuation of the original action for purposes of subject matter jurisdiction. It would be anomalous to torpedo a party bringing the independent action with a plea of sovereign immunity when the action is in reality a continuation of

> the original lawsuit in which jurisdiction was not an issue.

Pet. App. 20a-21a. *See generally* Moore's Federal Practice 3d § 60.80.

Petitioner relies heavily on a decision of this Court, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994), for the proposition that a federal court lacks ancillary jurisdiction to remedy a judgment previously entered in reliance upon misrepresentation or factual misstatements: "And the relief sought by respondents in this case is not the *effectuation* of the consent judgment entered in *Adams*, but its vacatur." Brief of Petitioners at 22 (emphasis in original). However, *Kokkonen* held that the district court lacked ancillary jurisdiction where the petitioner sought to enforce a settlement agreement which was never placed before the court, and became part of the court's proceedings and judgment entered. As this Court explained: "It must be emphasized that what respondent seeks is enforcement of the settlement agreement, *and not merely reopening of the dismissed suit* by reason of breach of the agreement that was the basis for dismissal." *Id.* at 378(emphasis supplied).

Hence, *Kokkonen* stands for the unremarkable point that ancillary jurisdiction, "which recognizes federal courts' jurisdiction over some matters (otherwise beyond their

competence) that are incidental to other matters properly before them," does not include actions not based on the underlying claim. *Id.* at 378, citing with approval *Fulton Nat'l. Bank of Atlanta v. Hozier*, 267 U.S. 276, 280 (1925)("[N]o controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.")[7].

Indeed, petitioner's entire argument with respect to ancillary jurisdiction confuses the present action with a quite different type of proceeding. The present case is not the wholly different claim (also denoted an "independent action") or entirely separate case. Such an action, in which one court is asked to modify the judgment of another court, is an entirely separate lawsuit with which the new court has no

[7] Likewise, this Court's decisions in *Peacock v. Thomas*, 516 U.S. 349 (1996) and *Stillman v. Combs*, 197 U.S. 436 (1905) can be distinguished. In *Stillman*, the Court held that a federal circuit court lacked ancillary jurisdiction to adjudicate parties' conflicting claims to land, when those parties had earlier dismissed their suit and agreed to support the rights of two of their number to effect a sale of the property to the United States, with an understanding that they would later arbitrate their respective interests in the proceeds. In *Peacock*, the Court held that a federal district court did not possess ancillary jurisdiction over new actions in which a federal judgment creditor ought to impose liability for a new money judgment on a person not otherwise liable for the judgment. Neither of these cases involved the same court that rendered a judgment subsequently modifying the judgment that had been previously obtained because of negligence or misrepresentation.

connection. *See, e.g., Carter v. Attorney General of the United States*, 782 F.2d 138, 142 n.7 (9th Cir. 1986)(*relying on Oliver v. City of Shattuck ex rel. Versluis*, 157 F.2d 150, 152 (10th Cir. 1946))("The rule contains a 'saving provision', the manifest purpose of which is to preserve intact and unimpaired the inherent power of the courts to entertain remedial actions for relief against judgements traditionally recognized at common law....In other words, the judicial process was not rendered less flexible by the advent of the new rule.").

Like any new lawsuit, such an independent action requires a new and independent statutory basis for the exercise of jurisdiction by the new court, as well as a specific waiver of sovereign immunity if the action is against the United States. *See, e.g., Carney v. United States*, 462 F.2d 1142, 1144 (Ct. Cl. 1972)("When the prior judgment attacked in the 'independent action' is that of a different court, the new court must be one having 'independent and substantive equity jurisdiction.'"). *See generally* Moore's Federal Practice 3d §60.84(2)(b).

Moreover, a ruling for petitioner in this case would overrule decisions in virtually every circuit court of appeals in the country that has examined the ancillary jurisdiction of a federal court to entertain an independent action such as the present one. *See, e.g., American Sec. Vanlines, Inc. v.*

Gallagher, 782 F.2d 1056 (D.C. Cir. 1986)("there can be no question of the power of a federal district court to vacate its own orders entered in civil actions over which it had original jurisdiction"); *Indian Head Nat'l Bank of Nashua v. Brunelle*, 689 F.2d 245 (1st Cir. 1982)(court has supervisory power over its own judgments); *Weldon v. United States*, 70 F.3d 1 (2d Cir. 1995)(independent action for relief allowed where court had original jurisdiction over case through statutory waiver of sovereign immunity); *Cresswell v. Sullivan & Cromwell*, 992 F.2d 60 (2d Cir. 1990)("When the basis for federal jurisdiction of the original suit no longer exists. . . the district court that entered the original judgment has inherent 'ancillary' equitable jurisdiction to entertain the suit for relief."); *Laskey v. Continental Products Corp.*, 804 F.2d 250 (3d Cir. 1986)("a court has inherent power to modify a consent decree that it initially had the power to approve."); *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 312 F.2d 702, 705 (5th Cir. 1954)("a court of equity has the jurisdiction and the right in an independent proceeding to protect a litigant from the effects, so far as equitably possible, of a judgment entered by mutual mistake of the parties, where it is shown that the party seeking relief is free from fault or negligence."); *Smith v. Widman Trucking & Excavating*, 627 F.2d 792, 799 (7th Cir. 1980)("If jurisdiction exists at the outset of a suit, subsequent events

will not divest the court of jurisdiction . . .There can be no question of the power of a Federal district court to vacate its own orders. . ."); *see generally* 13 Charles A. Wright, et al., *Federal Practice and Procedure* § 3523 (2d ed. 1984).

Once the one-year time limit for a Rule 60 (b) motion has run, petitioner's approach would strip the federal courts of all of their equitable power to do complete justice in instances where the government has prevailed in a lawsuit based on its misrepresentations or misstatements of fact. To avoid this unacceptable result, courts have repeatedly held – both before and after adoption of Rule 60(b) of the Federal Rules of Civil Procedure – that an independent action based on a court's ancillary jurisdiction is appropriate in the event of fraud on the court[8] or to relieve those judgments that are "manifestly unconscionable." *See Jones v. Anderson-Tully Co.*, 722 F.2d 211 (5th Cir. 1984); *Johnson Waste Materials v. Marshall*, 611 F.2d 593 (5th Cir. 1980); *Pacific R.R. of Missouri v. Missouri Pacific Ry. Co.*, 111 U.S. 505 (1884). Thus, the decision of the court below is in accordance with

[8] Petitioner argues that "[t]here is one important exception that is not at issue in this case. Rule 60(b) also does not limit the power of the court…to set aside a judgement for fraud upon the court." Pet. Br. at 19. In short, Petitioner argues that Rule 60(b) may have preserved ancillary jurisdiction in the event of fraud, while abolishing it in the event of misrepresentation or mistake. However, nothing in the language of the

the general rule that: "To allow the government to use sovereign immunity as a shield where it previously has invoked the court's jurisdiction upon its misrepresentations, negligence, or mistakes would do unacceptable violence to our basic notions of justice." Pet. App. 21a.

B. The Statute of Limitations of the Quiet Title Act's Waiver of Sovereign Immunity is Equitably Tolled Until Discovery of the Mistake.

The Quiet Title Act waives sovereign immunity for the filing of quiet title actions by any individual property owner against the United States with the condition that such lawsuits must be filed within a twelve year time period :

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

Rule or its commentary supports such a distinction, and Petitioner has offered no other support.

28 U.S.C. § 2409a(g). *See also Block v. North Dakota*, 461 U.S. 273 (1983).

Under a strict constructionist interpretation of the Quiet Title Act, which petitioner argues for in this case, plaintiffs who discover that the government prevailed in a quiet title action by reason of the government's own mistake or misrepresentation (or even fraud), have no remedy if the plaintiffs discover the mistake outside the twelve year time period. However, as the court below pointed out, such a result would "allow the government to use sovereign immunity as a shield where it has previously subjected itself to the court's jurisdiction and prevailed based upon its misrepresentations, negligence, or mistake, which would do unacceptable violence to our basic notions of justice." Pet. App. 21a.

In 1990, this Court considered and rejected the argument that petitioner puts forward in this case: "Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)(application of a 30-day statute of limitation for action against the United States based on Title VII of the Civil Rights Act, 42 U.S.C. § 2003-16(c)).

Unless Congress specifically prohibits the application of equitable estoppel, that doctrine (which Congress presumably knows and understands) is presumed to be part of the legislative intent underlying the statute of limitations established by Congress. *Irwin* at 95. As the *Irwin* Court explained: "Such a principle is likely to be a realistic assessment of legislative intent, as well as a practically useful principle of interpretation. . . . Congress, of course, may provide otherwise if it wishes to do so." *Id.*.

Certainly there is nothing in either the text or the legislative history of the Quiet Title Act to suggest that Congress intended to preclude equitable tolling of the time bar. Indeed, when the Quiet Title Act was amended in 1972 to include a twelve-year statute of limitations for plaintiffs, equitable tolling of the limitations period was not even discussed. 1972 U.S. Code Cong. and Adm. News, p. 4550. In a Justice Department letter to which the House Report was addressed, the reason given for a twelve-year limitation was that such a limit would prevent the United States from having to defend against "stale" claims. *Id.* at 4553. The record is silent on the issue of whether the provision was intended to bar claims to correct misrepresentations or misstatements of facts upon which the government had previously prevailed but which were not discovered until much later. A claim, such as the present one, to correct false facts which were

dispositive in the previous trial does not constitute a "stale claim", nor does it appear to be within the contemplation of Congress at the time the Quiet Title Act was passed.

The U.S. Court of Appeals for the Ninth Circuit has specifically rejected all of the arguments that petitioner advances here, holding that equitable tolling applies to the statute of limitations in the Quiet Title Act. *Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995) *vacated*, 117 S.Ct. 1103 (1997), *orig. opinion reinstated*, 113 F.3d 167 (9th Cir. 1997). "In sum, neither the legislative history nor the Court's decision in *Block* precludes application of equitable tolling to suits brought pursuant to the QTA's statute of limitations." *Fadem v. United States*, 52 F.3d at 206.

The holding in both *Fadem* as well as in the court below are consistent with the general rule set forth in *Irwin* that equitable tolling applies against the government. *See, e.g., Krueger v. Saiki*, 19 F.3d 1285, 1286 (8th Cir. 1994)("Because suits against the government are subject to equitable tolling, compliance with [Federal Tort Claims Act] limitations period is not a jurisdictional prerequisite to suing the government."), *cert. denied*, 513 U.S. 905 (1994); *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991)(holding that as a result of *Irwin*, statutes of limitations in actions against the government are affirmative defenses rather than jurisdictional bars). *See also Calhoun County v.*

United States, No. 97-40663 (5th Cir. Jan. 22, 1998)(discussing courts' decisions regarding equitable tolling of statutes of limitations in actions against the United States).[9]

Congress knows how to draft a statute of limitations which precludes equitable tolling. In *United States v. Brockamp*, 117 S. Ct. 849 (1997), for example, this Court found that Congress had done just that when it drafted § 6511 of the Internal Revenue Code:

> Section 6511 sets forth its time limitation in unusually emphatic form. Ordinarily statutes used fairly simple language, which one can often plausibly read as containing an implied "equitable tolling" exception . . . But § 6511 uses language that is not simple. It sets forth its limitations in a highly detailed technical manner, that linguistically speaking, cannot easily be read as containing implicit exceptions.

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[9] Furthermore, this case is fundamentally different from the situation involved in this Court's holding in *United States v. Brockamp*, 117 S. Ct. 849 (1997), where application of the *Irwin* rule was rejected because the statute of limitations was not just a time bar but a substantive decision of when penalties would start to accrue. In *Brockamp*, this Court held that applying the doctrine of equitable tolling to the statute of limitations contained in the Internal Revenue Code § 6511 "would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery—a kind of tolling for which we have found no direct precedent." *Brockamp*, 117 S. Ct. at 852.

United States v. Brockamp, 117 S. Ct. at 851. Specifically, § 6511 provides that a

> [c]laim for . . . refund . . . of any tax . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed . . . within 2 years from the time the tax was paid. . . [n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed . . . unless a claim for . . . refund is filed . . . within such period.

26 U.S.C. § 6511(a)-(b)(1). This complex and careful language contrasts with the broad language used to create the limitations period in the QTA: "Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. § 2409a(g).

Finally, this case (again in contrast to *Brockamp* where equitable tolling would result in the filing of thousands of tax refund suits) represents the rare circumstance in which the plaintiff was prevented from discovering the facts upon which his claim is based, by the misrepresentations and misstatements of petitioner, until after the statute of limitations (according to petitioner) had run. A ruling in this

case for petitioner would commence the inexorable running of the twelve year statute of limitations when the Plaintiff knows or should know of the claim of the United States – even though that claim is a false one, based on misrepresentation or misstatement of fact. Nothing in the statute or its legislative history suggests that Congress intended petitioner to be able to take private property with impunity, so long as petitioner's mistake went undiscovered for twelve years.

C. Construing the Quiet Title Act's Statute of Limitations to Bar Relief in This Case Would Violate the Due Process and Just Compensation Clauses of the Fifth Amendment.

A statute will ordinarily be construed so as to comport with constitutional limitations. *Communications Ass'n v. Douds*, 339 U.S. 382, 407 (1950)("It is within the power and is the duty of this Court to construe a statute so as to avoid the danger of unconstitutionality if it may be done in consonance with the legislative purpose."). This Court's preference for such an interpretation is predicated on the sound premise that Congress should be presumed to have intended to enact the law in accordance with constitutional provisions, and would prefer that the statute be preserved by

such an interpretation rather than invalidated by a construction that would render it unconstitutional and void. *Becker Steel Co. v. Cummings*, 296 U.S. 74, 79 (1935)("In determining whether the remedy given is thus restricted it must be presumed that Congress intended that it should be constitutionally sufficient.")

A construction of the Quiet Title Act's (QTA) statute of limitations that would save it from a collision with the Fifth Amendment's due process and compensation protections, therefore, will be preferred over one that would render it unconstitutional and void for violation of those provisions.

The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation." Petitioner's proffered interpretation of the QTA's statute of limitations (allowing the government to retain title to land which it took on the basis of its own misrepresentations) would render this provision unconstitutional, and is therefore a disfavored interpretation.

The essential guarantee of the Due Process Clause is that of fairness. *Daniels v. Williams*, 474 U.S. 327, 331 (1986)(stating that the purpose of the Due Process Clause is to prevent government from abusing its power or employing

it for purposes of oppression). Government actions that deprive an individual of life, liberty, or property must be fundamentally fair. In practical terms, what the Due Process Clause means is that at a minimum when facts or issues are disputed, then the person whose interests are at stake must be granted a fair procedure to resolve the dispute. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993): As this Court explained:

> "The purpose of this requirement [of due process] is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property. . ."

Id. at 50, *quoting Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

In the present case, the interpretation of the Quiet Title Act's limitation period urged by the government is patently unfair. The government gained title to Respondents' property in 1982 through its own misrepresentations and the absence of a critical document (the Boudreau Grant) which the government had in its possession at all times.

Respondents brought the instant lawsuit to rectify the mistake made during the prior litigation and clear the cloud on their title to the subject property. Petitioner now argues that the limitations period in the Quiet Title Act operates as a bar to respondents obtaining any procedure to remedy petitioner's prior misrepresentation. However, due process, to the contrary, demands the opportunity for respondents to have a fair hearing on their claims. Accordingly, the Quiet Title Act should be construed in a manner that allows respondents full and fair opportunity to challenge the government's claim of title, consistent with the requirements of the Due Process Clause.[10]

Similarly, the Just Compensation Clause of the Fifth Amendment contains no limitations or exceptions for its guarantee and the government may not refuse such compensation where a taking has occurred. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987). The obligation for just compensation simply attaches whenever government

[10] In fact, the government itself appears to have laid bare its intention to prevent a fair hearing of these claims almost thirty-years ago. A Department of Interior land acquisition officer told respondent James R. Beggerly: "Mr. Beggerly, there is something you need to know. In the end, we will have your property and it will be on our terms and our conditions. We will either wear you out, break you, or both." Affidavit of James R. Beggerly, J.A. 88.

action works a taking of private property rights. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This constitutional obligation is so evident that this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy to which he is entitled if private property is taken. *First English*, 482 U.S. at 304; *United States v. Clarke*, 445 U.S. 253, 257 (1980).

This guarantee of just compensation applies whether property is taken through the traditional process of eminent domain or through other means. In *Kaiser Aetna v. United States*, the owner of a pond created a channel which connected it with open water. 444 U.S. 164 (1979). The government then asserted jurisdiction over the pond on the grounds that it had become a navigable water of the United States, available for public use. This Court, however, established the Fifth Amendment limitation upon such a construction:

> [T]he Government must condemn and pay before it takes over the management of the land-owner's property. In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the

> Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately-owned marina. [citations omitted] And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.

Id. at 179-80.

In the case at bar, the government's interpretation of the limitations provision of the Quiet Title Act results in a confiscation of private property without just compensation in violation of the Fifth Amendment. Respondents did not have any factual basis on which to bring a Quiet Title Act claim until at least 1991, when the Boudreau Grant was discovered in the National Archives. Any Quiet Title Act claim brought by respondents prior to that time, lacking any evidence of a valid grant or patent, would have had no factual basis and would not have survived a Rule 12(b)(6) challenge under the Federal Rules of Civil Procedure. Yet, according to petitioner, the limitations period on such a claim would have run out before respondents discovered the Boudreau Grant evidencing their claim in 1991.

Therefore, the petitioner was able in this case to obtain possession and title to private property as a direct

result of its own misrepresentation to the court in the 1979 quiet title action, paying a nominal price for the land far below the value of the comparable property. Petitioner will never be subject to any action for relief of this taking of private property if respondents cannot now challenge the government's claim to title after they have finally found the true land grant. Such a result is indistinguishable from a case where the government had simply condemned respondents' property for use in the federal park system with one crucial difference—in the present case the petitioner has avoided payment of just compensation through its own misrepresentations. The Quiet Title Act must be interpreted in accord with the Just Compensation Clause to allow property owners the ability to resolve title disputes with the government where the government avoided payment of just compensation because of fraud or mistake of fact that is not discovered until after the Act's limitations period would have otherwise expired.

II. THE CASE WAS RIGHTLY DECIDED.

The court below held that, as a matter of law, the 1781 grant of land on Horn Island by Spanish Governor General Bernardo de Galvez to Catarina Boudreau was a valid transfer of the subject property out of the public domain

into the hands of respondents' predecessor-in-interest. *Beggerly v. United States*, 114 F.3d 484, 488 (5th Cir. 1997). At no point in this litigation has petitioner questioned the factual basis for the existence of the Boudreau Grant. Instead, petitioner now questions the legal validity of the Boudreau Grant under the theory that Galvez did not have the authority to make such a grant based on this Court's decision in *United States v. Power's Heirs*, 52 U.S. (11 How.) 570 (1851).

Moreover, petitioner also now raises, for the first time in this litigation, a "grab bag" of theories, such as adverse possession and incomplete chain of title, that purport to show how the Fifth Circuit erred in ruling that respondents hold superior title to the subject property as compared to petitioner.[11] None of the theories advanced by petitioner,

[11] Petitioner challenges the authority of Bernardo de Galvez to issue the Boudreau Grant for the first time in this Court. This Court has repeatedly held that it will not consider questions not raised by the parties in the courts below. *See, e.g., Oklahoma Tax Comm. v. Chickasaw Nation*, 515 U.S. 450 (1995)(Court will not consider claim raised for the first time in state's brief on the merits that a federal statute expressly authorized states to tax motor fuel on Indian reservations); *United States v. Larkin*, 59 U.S. 557 (1855)(objection that Mexican grant was fictitious could not be raised for the first time in Supreme Court). Likewise, petitioner also raised for the first time in its brief on the merits an adverse possession claim. Clearly it is now too late to assert this affirmative defense. Pursuant to Rule 8 (c) of the Federal Rules of Civil Procedure, a party must set forth all affirmative defenses. Petitioner has not asserted this defense in its answer to the complaint, J.A. 28-37, nor did it raise the

however, provide a reason for this Court to overturn the decision by the court below.[12]

A. This Case Is Not Controlled by *Power's Heirs*.

Petitioner contends that this Court's decision in *United States v. Power's Heirs*, 52 U.S. (11 How.) 570 (1851), "compels the conclusion that the Boudreaux Grant

defense in any of the proceedings below. Hence, this Court should not rely on these arguments at this late date.

[12] Petitioner also contends that the court below lacked jurisdiction to decide the summary judgment motion. Pet. Br. at 30. This assertion, however, is incorrect. As precedent for this proposition, Petitioner relies, in large part, on Ninth Circuit decisions holding that denial of summary judgment is never reviewable on appeal from the court's dismissal for lack of subject matter jurisdiction. *See Burke v. Ernest W. Hahn, Inc.*, 592 F.2d 542, 546 (9th Cir. 1979). The better rule, and the one followed by the majority of circuits, however, is a rule that focuses on whether the question before the reviewing court is one of fact or law. For example, in *Swaback v. American Info. Technologies Corp.*, 103 F.3d 535 (7th Cir. 1996), the Seventh Circuit held that "[t]he reason that appellate courts, when reversing a grant of summary judgment, typically do not direct the district court to enter summary judgment in favor of the appellant is because a genuine issue of material fact remains . . . But, in instances in which the facts and law establish that the appellant is entitled to judgment as a matter of law, we are free to direct the district court to enter judgment in appellant's favor." *Id.* at 543-44. *See also Sacred Heart Medical Center v. Sullivan*, 958 F.2d 537, 544 (3d Cir. 1992)(holding that where cross summary judgment motions are filed, appellate court may properly review and set aside denial of summary judgment where facts are uncontroverted). There are no disputes of material fact in this case. Petitioner has not questioned the existence of the Boudreau Grant (the primary factual basis for this lawsuit), but merely its legal significance. Moreover, Petitioner has not to date disputed any facts surrounding Respondents' conduct after the conclusion of the *Adams* litigation. As a result, the only issues before the court below concerned matters of law, and were thus properly resolved below.

would *not* have been valid when it was purportedly made." Pet. Br. at 37. However, petitioner's reliance on *Power's Heirs* in the instant case is misplaced.

In *Power's Heirs*, the respondents traced their title to the subject property in that case back to a grant purportedly made by Governor General Galvez to Francisco Caminada on August 1, 1781. This grant was evidenced solely by a secondhand copy of the grant found in the records of the Spanish notary office in New Orleans, described by Justice Catron as an "unsupported and mutilated copy . . . unaccompanied by a plan of survey and process verbal." *Power's Heirs*, 52 U.S. at 577.

The Court held that this evidence alone did not support the finding that the grant was valid, since other items required by the applicable Spanish law of the time (all of which are present in this action) were missing from the record.

Further, the Court held that Galvez did not have authority to make grants in West Florida in 1781 because the evidence before the Court showed only that Galvez was Governor of Louisiana (which did not encompass the West Florida territory), and the record did not indicate that the King of Spain had granted Galvez any additional authority prior to 1783. *Id.* at 579-80. As a result, the Court held that

the grant to Caminada, even if it existed, had no force. *Power's Heirs*, 52 U.S. at 580.

1. *Stare Decisis* Does Not Require This Court To Follow Its Holding In *Powers' Heirs.*

This Court is not, as petitioner contends, bound by *stare decisis* to its holding in *Power's Heirs.* The holding of *Power's Heirs* concerned an interpretation of the law of a foreign sovereign—eighteenth century Spain—and this Court has long held that such decisions do not fall within the doctrine of *stare decisis.* As a result, the holding of *Power's Heirs* concerning the ability of Galvez to make land grants does not control this case and should be reversed by this Court in light of the historical evidence in the record that was not brought before the Court in 1851.

This Court's "customary practice of *stare decisis*" does not extend to treaty interpretation or foreign laws. As stated in R.B. Schlesinger *et al.*, *Comparative Law* 88 (5th ed. 1988): "A judicial decision on a point of foreign law is generally held not to constitute the binding precedent."

In *Summe Corp. v. California ex rel. Lands Comm'n*, 466 U.S. 198, 201-02 n.1 (1984) where a Mexican grant of land in California was at issue, this Court stated that it was "beyond cavil that we may take a fresh look at what Mexican

law may have been [at the time of the grant]." Moreover, this Court has held that federal court interpretation of the law of foreign sovereigns is analogous to federal court interpretation of state law:

> It is proper to remark, that the laws of these territories under which titles were claimed, were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a State of the Union.

Fremont v. United States, 58 U.S. (17 How.) 542 (1855). As is the case when federal courts apply state law, the law of former foreign sovereigns is not "foreign" law as such, but falls to be ascertained by this Court (through a "fresh look" if need be) and applied to the case at hand. Its *source*, however, is foreign and not shaped and developed by this Court in the same manner as the federal law of the United States. Accordingly, this Court's "customary practice of *stare decisis*" invoked by petitioner, Pet. Br. at 43, in support of the precedential value of *Power's Heirs* as to findings of Spanish law is inapplicable in the present case.

2. The Holding In *Powers' Heirs* Is Inapposite To The Present Case Because It Rested On Significantly Different Facts.

This Court's holding in *Power's Heirs* was predicated on the fact that the actual grant at issue in that case had not been located but was instead evidenced only by incomplete secondhand sources. In contrast, respondents' title is based on the Boudreau Grant that is evidenced by a complete case file of that grant, consisting of application, order of survey, survey, and grant, tendered by the heirs of the grantees to the authorities of the United States in 1816. J.A. 103-05. This fact lends tremendous weight to the conclusion of the court below that the respondents' predecessors in interest were, in fact, granted the property by Galvez in 1781 and easily distinguishes the present case from *Power's Heirs*, where this Court found cause to express skepticism over the actual existence of any grant from Galvez to Caminada.

Moreover, it is apparent from the decision itself that this Court in 1851 had an incomplete record before it when it made the decision and hence erroneously concluded that the King of Spain had not granted Spanish Governor General Bernardo de Galvez authority to issue grants in Mississippi in 1781:

> Nothing is found in these historical details indicating that the Spanish laws had been introduced into Florida, and superseded those of England, and that civil power had been vested in Galvez to grant lands. *As this could only be done by the king, all presumptions are opposed to such supposition.*

United States v. Power's Heirs, 52 U.S. (11 How.) 570, 579 (1851)(emphasis supplied).

The complete historical record, that was available to the court below through expert testimony of Dr. Hans Baade, clearly and unambiguously reveals that the King of Spain had granted Galvez authority to make land grants in the Mobile District well before August 1, 1781. J.A. 131.

The *Power's Heirs* Court based its decision on the "history of Florida and of its conquest by Spain" so far as then within judicial notice. The Court noted the conquest of Mobile from the British by Galvez on March 14, 1780, and that of Pensacola on May 9, 1781. The Caminada grant of August 1, 1781, this Court stated:

> purports to have been made within eighty days after the capitulation of Pensacola; a time, at that day, hardly sufficient to have heard from Spain, after the account of the capitulation reached there, had there been no hostile

> British fleet intervening to intercept intercourse.

Power's Heirs, 52 U.S. (11 How.) at 579. However, as set forth in Section II (B), *infra*, Spanish archival records clearly show that Galvez was in communication with the authorities in Spain at all stages of his campaign against the British and that Galvez had been informed well before August 1, 1781 that he had been made "Governor of Louisiana and Mobile" by the King of Spain.

These sources of information regarding the authority of Galvez were unavailable to the Court in 1851, however. The primary official source for such historical information is the Spanish archives of Louisiana and the Floridas, catalogued as the "Papeles Procedentes de Cuba" in the Archivos General de Indias in Seville, Spain. These documents reached Spain from Havana between 1885 and 1889. As a practical matter, however, this collection did not became available to scholars in the United States until 1916.[13]

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[13] This information was published in the United States in 1916 as *Descriptive Catalogue of the Documents Relating to the History of the United States* in the *Papeles Procedentes de Cuba deposited in the Archivo General de Indias at Seville*, published by Roscoe R. Hill, Professor of History at the University of New Mexico, under the auspices of the Carnegie Institution. Based on two years' research *in loco* by

Because neither the records in the Archivos General de Indias nor the scholarly interpretations of these records were available to this Court in 1851, the Court's holding in *Power's Heirs* questioning the authority of Galvez to grant land in the Mobile District must be reevaluated and rejected in light of the scholarship that has emerged in this century concerning this question.

B. The 1781 Land Grant Conveyed Title To Respondents' Predecessors.

The historical record as it is available today clearly indicates that Bernardo de Galvez was, in fact, the "Governor of Louisiana and Mobile" for several months before granting Horn Island to the widow Catarina Boudreau, and therefore,

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Professor Hill, this catalogue opened up, in his words, a "virgin field for investigation." *Id.*, introduction at xxxiii.
Moreover, Spanish archive-based research on the legal history of Spanish North America is of even more recent origin. Serious historical work on the subject began primarily with the work of Professor Hans W. Baade of the University of Texas Law School, whose research in the Archivo General de Indias is reflected mainly in "The Formalities of Private Real Estate Transactions in Spanish North America, A Report on Some Recent Discoveries," 38 La. L. Rev. 655 (1978) and "Marriage Contracts in French in French and Spanish Louisiana: A Study in Notarial Jurisprudence," 53 Tulane L. Rev. 1 (1979). Indeed, it was Professor Baade's unparalleled reputation and accomplishment in this field that led respondents to seek his opinion on the validity of the Boudreau Grant in the form of a legal memorandum. See J.A. at 117.

Galvez had full authority under Spanish law to grant portions of Horn Island to respondents' predecessor in interest.[14]

The Mobile District, which included the property at issue in this case, was under the authority of Spanish law at the point that British forces in Pensacola capitulated to Governor Galvez in May 1781—approximately three months before Galvez granted the subject property to Catarina Boudreau. In their draft of the Articles of Capitulation, the British officials in charge of West Florida, successfully conquered by Governor Galvez, proposed to leave the ultimate fate of the Province of West Florida to the determination of the respective sovereigns. This was rejected by Galvez, who substituted language confirming immediate

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[14] Petitioner also asserts that "respondents have not established a chain of title between themselves and Boudreau." Pet. Br. at 47. Respondents, however, need not establish such a chain of title to quiet title against the petitioner's claim because petitioner asserts title based on the 1803 Louisiana Purchase. "A plaintiff in an action to quiet title has the burden to prove title superior to the other party, not superior to the whole world, and must prevail on the strength of its own title and not on any weakness in the title of the other party." *Ollison v. Village of Climax Springs*, 916 S.W.2d 198, 203 (Mo. 1996). *See also United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982)(holding that court may finally determine conflicting title claims as between parties). Respondents' title does not derive from the Boudreau Grant, but from the 1950 Mississippi tax foreclosure sale. The Boudeau Grant has been proffered by respondents to demonstrate that the subject property was deeded out of the public domain before the Louisiana Purchase. By providing proof of their own title and proof that petitioner has no valid claim based on the Louisiana Purchase, respondents have clearly met their burden of proving title superior to that of petitioner.

Spanish sovereignty over the province. *See* Carmen de Reparaz, *Yo Solo. Bernardo de Galvez y la Toma de Panzacola en 1781*, Una Contribución Española a la Independencia de los Estados Unidos 256, 239-42 (1986). Therefore, contrary to petitioners' assertions regarding the status of West Florida and the Mobile District as a result of conquest, the document of surrender signed by the vanquished British forces explicitly recognized that West Florida would be governed as Spanish territory under principles of Spanish law.

As readily ascertainable from Spanish records now accessible, Galvez was in regular communication with royal authorities in Madrid at all stages of the West Florida campaign. Furthermore, with the conquest of Mobile, Galvez was already in control of the Mobile District by March 14, 1780, more than seventeen months before the Boudreau Grant of August 1, 1781. As Professor Caughey[15] has noted: "Manifestations of royal appreciation of Galvez' good work at Mobile were soon forthcoming." John Walton Caughey, *Bernardo de Galvez in Louisiana* 186 (1934).

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[15] Professor John Walton Caughey's book *Bernardo de Galvez in Louisiana* (1934) was one of the first major works of scholarly research in this field.

After discussing a letter to Galvez from his uncle, the Secretary of the Indies, Professor Caughey goes on to state:

> Finally, in reward for the capture of Mobile, Galvez was made field marshal in command of Spanish operations in America, and he received the augmented title, "Governor of Louisiana and Mobile."

Id. at 212 (citing Galvez to Galvez, February 12, 1781, A.G.I., Cuba 175). In addition to Galvez' royal grant of authority as Governor of Louisiana and Mobile, the King issued a royal order, also on February 12, 1781, that provides further proof of Galvez authority to govern the Mobile District:

> The King, having considered the great extent acquired by the Province of Louisiana through the conquests that you have made of the English Ports and Settlements on the Mississippi and at Mobile, and having in mind the decorum with which you should be treated as Commander-in-Chief of the Arm of Operations at Havana; has been pleased to decree that, for the present, and while you govern Mobile and Louisiana, their administration shall be independent of the Captaincy General of the Island of Cuba, and that Pensacola and its district shall be added to your jurisdiction as soon as they are occupied by the forces of the King, who fully authorizes

you to govern and defend them through Substitutes during your absence.

Translation of Royal Order of Charles III, dated February 12, 1781, set forth in D. Corbitt, *The Administrative System in the Floridas, 1781-1821*, 1 *Tequesta* No. 2, 41-42 (Aug. 1942).[16]

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[16] Petitioner argues that principles of international law dictate that the mere fact of conquest did not permit Galvez, or the King of Spain, for that matter, to assert governing authority over the Mobile District absent a formal treaty providing for annexation of the conquered territory. Pet. Br. at 39-42. This contention, however, is erroneous. Petitioner fails to cite the leading contemporaneous American treatise of H.W. Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War* (1861). Halleck states that:

> by the just rules of war, the conqueror has the same right to use or alienate the public domain of the conquered or displaced government, as he has to use or alienate its moveable property . . . the purchase of any portion of the national domain of a conquered country takes it at the risk of being evicted by the original sovereign owner, if he should be restored to the possession of his dominions. But if such restoration should not take place, and the title of the conqueror should be confirmed by some of the modes recognized by international law, the title of the purchaser is then made perfect. It was before, a good and valid title against all except the original sovereign owner, under the *jus postliminii*, which right is completely extinguished by a confirmation of the conquest.

Id. at 448-49. Moreover, this Court has also recognized this fundamental principle of international law. In *Fremont v. United States*, 58 U.S. (17 How.) 542 (1854), this court stated that "there is no principal [sic] of public law which prohibits a citizen of a conquering country from purchasing property, real or personal, in the territory thus acquired and held; nor is there any thing in the principles of our government, in its

Moreover, Governor Galvez began to exercise his civil authority almost immediately after conquering Pensacola on May 9, 1781. Professor Caughey states that:

> Galvez left soon after the prisoners, giving final instructions on June 4 to Arturo O'Neill, who was to be the new commander at Pensacola. His instructions related mostly to military defense, but since the town's principal merchants had expressed concern that the "Courts of Judicature" should continue to operate, he ordered O'Neill to promulgate the Code O'Reilly, which had been the basic law of Louisiana since November 25, 1769.

Caughey, at 212. The "Code O'Reilly," under which Spanish Louisiana was governed during this period, had transformed Louisiana into a Spanish province subject to the same laws as other Spanish possessions in the Americas. *See* A. N. Yiannopoulos, "The Civil Codes of Louisiana," in A. N. Yiannopoulos, ed., *Louisiana Civil Code*, 1997 Edition XIX-XX (1997). Accordingly, by applying the Code O'Reilly to the Mobile District in May, 1781, Galvez used

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policy or its laws, which forbids it." *Id.* at 564. Accordingly, international law clearly recognizes the title to property granted by conquering sovereigns prior to the conclusion of a formal peace treaty.

his authority as Governor of Louisiana and Mobile to implement Spanish law in the Mobile District, under which Galvez had unquestionable authority to make grants of land.

Official news and full documentation of the conquest of West Florida reached Spain on July 27, 1781. On August 12 of that year, Charles III created a new Captaincy General of Louisiana and West Florida, and appointed Galvez the first Governor of Louisiana and West Florida.

Even though this title was given to Galvez after he made the Boudreau Grant, Galvez' prior royal grant of authority as "Governor of Louisiana and Mobile," coupled with his promulgation of the Code O'Reilly into the Mobile District in May, 1781, clearly show that he had the authority to apply Spanish law to Horn Island as part of the Mobile District, including the authority to grant the Island to private individuals. As a result, the Boudreau Grant was a completely valid grant vesting title in the respondents' predecessors in interest.

CONCLUSION

The judgement of the Court of Appeals should be affirmed.

Respectfully submitted,

Nancie G. Marzulla
Christopher J. Oberst
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW
Suite 410
Washington, DC 20036
202-822-6770

Ernest G. Taylor, Jr.*
Robert M. Arentson, Jr.
WATKINS LUDLAM WINTER & STENNIS, P.A.
633 North State Street
Jackson, MS 39202
601-949-4900

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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CHRIS W. BEGGERLY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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1. *Availability Of Independent Action.*

In arguing that a consent judgment entered in 1982 fixing rights in real property should be set aside now because of "mutual mistake" in the initial litigation—as supposedly demonstrated by documents in the National Archives to which respondents had free access during the time of the initial litigation—respondents give little credit to the value of finality in the law (which is at its acme in land disputes, see U.S. Br. 24). As this Court has explained:

> This general rule [of finality in litigation] is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of

such tribunals in respect of all matters properly put in issue and actually determined by them.

Southern Pac. R.R. v. *United States*, 168 U.S. 1, 49 (1897).

The legal system does recognize that in narrow circumstances the principle of finality is outweighed by the need to reexamine litigated matters in order to do justice; but even so, the time in which litigation may be reopened for that purpose is not open-ended. Federal Rule of Civil Procedure 60(b) sets forth the general policy governing the reopening of final judgments in the federal courts. Under that Rule, a final judgment may be reopened on the bases alleged here (mistake and fraud, J.A. 23-25) "not more than one year after the judgment * * * was entered." Even motions under Rule 60(b) not subject to that absolute one-year limit must be made "within a reasonable time." Fed. R. Civ. P. 60(b). Those time limits embody the balance struck in the federal courts between the general principle of finality and the occasional need to do corrective justice. And respondents' effort to avoid the effect of the final judgment in the United States' quiet-title action, *United States* v. *Adams*, was made far too late under Rule 60(b).

Rule 60(b) does not itself preclude the possibility of an "independent action" to set aside a judgment, brought as an original matter in district court. If substantive law provides the basis for such an action, and if the other prerequisites to such an action, such as subject-matter jurisdiction and a waiver of sovereign immunity (when the action is brought against the sovereign) are present, then such an action may go forward notwithstanding Rule 60(b), for the Federal Rules do not "abridge, enlarge or

modify any substantive right." 28 U.S.C. 2072(b). In the absence of such substantive and jurisdictional grounding for a new lawsuit, however, relief from a final judgment must be sought under Rule 60(b), as the Rules are "complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments." Rule 60(b) advisory committee note (1946).

For that reason, respondents' effort (Br. 16-17) to distinguish *Kokkonen* v. *Guardian Life Insurance Co.*, 511 U.S. 375 (1994), is unpersuasive. In *Kokkonen*, the Court "emphasized" that the relief sought in that case was enforcement of a settlement agreement that had concluded federal-court litigation, "and not merely reopening of the dismissed suit by reason of breach of the agreement that was the basis for dismissal." *Id.* at 378. The Court went on to note that some courts of appeals have held that litigation may be reopened after final judgment for breach of a settlement agreement *under Rule 60(b)(6)*. *Ibid.* The decisions cited by the Court relied on Rule 60(b)(6) itself, which permits relief from final judgment, on motion made within a reasonable time, for "any * * * reason justifying relief from the operation of the judgment" other than those reasons mentioned elsewhere in the Rule.[1] The cited cases did not order

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[1] See *Keeling* v. *Sheet Metal Workers Int'l Ass'n*, 937 F.2d 408, 410 (9th Cir. 1991); *Harman* v. *Pauley*, 678 F.2d 479, 481 (4th Cir. 1982); *Fairfax Countywide Citizens Ass'n* v. *County of Fairfax*, 571 F.2d 1299, 1302-1303 (4th Cir.), cert. denied, 439 U.S. 1047 (1978). Several other cases relied upon by respondents (Br. 18-20) for the proposition that federal courts may reopen their final judgments without an independent basis for jurisdiction similarly involve or discuss motions made under Rule 60(b), and are therefore irrelevant to the question whether an independent action requires such an independent basis. See

or recognize the permissibility of reopening litigation under an "independent action" based on ancillary jurisdiction derived from the original lawsuit. But Rule 60(b)(6) cannot help respondents here, for they are asserting grounds for relief from judgment expressly mentioned in Rule 60(b)(1) and (3), and so they cannot rely on Rule 60(b)(6). See *Pioneer Investment Servs.* v. *Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 393 (1993).

Respondents suggest (Br. 12-13) that the United States' institution of its quiet-title action in *Adams* waived the government's sovereign immunity to claims of mistake and fraud such as are asserted here.

Lasky v. *Continental Prods. Corp.*, 804 F.2d 250, 255-256 (3d Cir. 1986); *American Sec. Vanlines, Inc.* v. *Gallagher*, 782 F.2d 1056, 1062-1063 (D.C. Cir. 1986) (per curiam); *Smith* v. *Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 799-800 (7th Cir. 1980); *Johnson Waste Materials* v. *Marshall*, 611 F.2d 593, 600-601 (5th Cir. 1980). Some of the cited cases merely refer to the possibility of an independent action without endorsing one. See *Herring* v. *FDIC*, 82 F.3d 282, 285-286 (9th Cir. 1995), cert. denied, 117 S. Ct. 581 (1996); *Treadaway* v. *Academy of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1421 (9th Cir. 1986); *Jones* v. *Anderson-Tully Co.*, 722 F.2d 211, 213 (5th Cir. 1984); *Indian Head Nat'l Bank* v. *Brunelle*, 689 F.2d 245, 250 (1st Cir. 1982).

We acknowledge, of course, that some courts of appeals—particularly the Second and Fifth Circuits—have held that an independent action in equity for relief from judgment may be predicated on the power of the court that heard the initial suit; thus, in our certiorari petition (at 16-17) we pointed to a circuit conflict on the question. In light of recent decisions of this Court such as *Kokkonen* dictating a narrow view of the concept of ancillary jurisdiction, those lower-court decisions upholding a court's authority to set aside a final judgment outside the time limits of Rule 60(b) without an independent source of jurisdiction, including where necessary a waiver of sovereign immunity, must now be viewed as erroneous.

Respondents confuse counterclaims that may be raised against the United States in defense to litigation brought by the government with claims asserted as the basis of an affirmative action against the United States. When the United States brings a lawsuit, the party defendant may *in that litigation* raise counterclaims without pointing to a separate waiver of sovereign immunity, in order to avoid the relief sought by the government. Once the litigation brought by the government is concluded, however, a party may not raise new claims for relief against the government without a waiver of sovereign immunity. Thus, in *United States* v. *Dalm*, 494 U.S. 596 (1990), the Court held that a taxpayer who had paid both gift taxes and income taxes on a single transaction could not, because of sovereign immunity, pursue an untimely gift tax refund claim based on equitable recoupment even though the taxpayer might have been able to raise equitable recoupment in previous litigation over the income tax liability. The Court explained that the distinction between concluded cases and new litigation against the government "has jurisdiction as its central concept" and therefore must be heeded. *Id.* at 606. See also *Carr* v. *United States*, 98 U.S. 433, 438 (1878); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869).

Nor does *Pacific Railroad* v. *Missouri Pacific Railway*, 111 U.S. 505 (1884), support a broad modern authority in the federal courts to vacate their final judgments because of "mutual mistake," without regard to the time limits of Rule 60(b) or the usual precepts of jurisdiction and sovereign immunity. That case, involving a bill filed in equity to impeach a decree of the same court for fraud, is best viewed as a case of "fraud upon the court," which (as we explained in our opening brief at 19 n.11) the rendering court

may always correct notwithstanding the time limits of Rule 60(b).[2] In this case, however, the district court found no evidence of fraud upon the court, Pet. App. 40a-41a, and the court of appeals did not disagree. Moreover, contrary to respondents' suggestion (Br. 20 n.8), there is no inconsistency between an inherent power of a court to reopen judgments to remedy fraud perpetrated *upon it* and a principle limiting the court's power to reopen judgments for other reasons to the time limits established in the Federal Rules. Fraud upon the court, in the correct narrow understanding of that term, is an assault on the legal system itself; it implicates concerns beyond those of individual litigants and may therefore require broader remedies for correction. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245-246 (1944).

2. *Quiet Title Act.*

Respondents' argument that the statute of limitations for actions brought under the Quiet Title Act (QTA), 28 U.S.C. 2409a(g), is subject to equitable tolling fails to grapple with either the language of that provision or the legislative intent reflected in it. Section 2409a(g) states that a QTA cause of action shall accrue "on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." The limitation period is

[2] Alternatively, the *Pacific Railroad* case may be viewed as an example of the earlier practice of filing ancillary bills in equity to impeach judgments at law or equitable decrees rendered by the same court. As we have explained in our opening brief (at 18-21), that practice became obsolete upon the promulgation of the Federal Rules and their subsequent amendment to abolish definitively all forms of ancillary relief from judgment in civil cases other than Rule 60(b) motions.

therefore based on actual or constructive knowledge of the government's claim, not accumulation of evidence to support the plaintiff's claim. Respondents knew that the United States had a claim to the disputed lands in 1979, at the very latest, when the government broke off negotiations over purchasing the property and informed respondents that there had been no federal patent on the lands. Based on that knowledge, they had an obligation to bring suit in a timely fashion, and to conduct timely research into the historical basis for their own claim, including research in the National Archives if necessary. Nothing in the record indicates that respondents could not have found their evidence of the Boudreau Grant in the National Archives had they hired a researcher in 1979 rather than waiting until 1991.

A rule tolling the limitation period until the point at which a court might conclude that the plaintiff had sufficient evidence to support his claim is inconsistent with the QTA's focus on knowledge of the government's (as opposed to the plaintiff's) claim, as well as Congress's intent that "the Government will not have to defend against sta[l]e claims." H.R. Rep. No. 1559, 92d Cong., 2d Sess. 5 (1972); see *Block* v. *North Dakota*, 461 U.S. 273, 282-284 (1983). For some causes of action that are inherently based on information in the hands of the defendant, it may be reasonable to delay the accrual date until the point at which the plaintiff discovers (or should reasonably discover) evidence to support his claim. See *Klehr* v. *A.O. Smith Corp.*, 117 S. Ct. 1984, 1988 (1997). Generally, however, a plaintiff claiming an interest in land is in the best position to know of his own claim. It is also reasonable to assume that such a plaintiff is in at least as good a position as that of the defendant to know of or discover evidence supporting that claim. The policies

of statutes of limitations should therefore require a plaintiff claiming an interest in land to begin his research as quickly as possible (especially since certainty of title to land is vital). But under a rule permitting delay of suit until a plaintiff accumulated evidence supporting his own claim, plaintiffs would have a diminished incentive to conduct thorough research on the factual and legal bases of their land claims. Cf. *id.* at 1993 (construing RICO statute of limitations to include "reasonable diligence" rule, "to encourage [plaintiffs] themselves diligently to investigate" basis for a claim); *United States* v. *Kubrick*, 444 U.S. 111, 118-125 (1979) (for similar reasons, holding that claim under Federal Tort Claims Act accrues when plaintiff knows cause of his injury, not when he knows that the acts inflicting the injury were negligent).

Nor can respondents avoid the statute of limitations by contending that the United States made misrepresentations about the nonexistence of foreign land grants to Horn Island. During the *Adams* litigation, respondents had at their disposal the full range of discovery powers to test any assertions made by the government; they also had access to the National Archives, as well as the *American State Papers*, a published reference source in which the Boudreau Grant is mentioned. Respondents knew that they claimed an interest in land on Horn Island, and that the United States claimed the same land. The running of the statute of limitations should not depend on anything more. See *Richmond, Fredericksburg & Potomac R.R.* v. *United States*, 945 F.2d 765, 769-770 (4th Cir. 1991), cert. denied, 503 U.S. 984 (1992).[3]

[3] Respondents make some assertions about the *Adams* litigation that warrant brief response. First, they point out

(Br. 3) that, in the government's summary judgment motion in *Adams*, the government stated that no foreign land grants had been issued on the subject lands before the Louisiana Purchase. In context, however, that language in the government's motion and the accompanying discussion clearly conveyed the point that no foreign land grants to Horn Island had ever been recognized as valid by any federal land commission or by Congress, which is undisputed. See J.A. 235 ("With regard to the lands at issue in this case, the record is conspicuously blank; there is no favorable commission report, no congressional approval, and no patents. In sum, there is no record of any defendant or predecessor in interest having a valid patent based on a foreign land grant.").

Second, respondents erroneously state (Br. 3 n.4) that Michael Knipfing testified in *Adams* that "the government had not researched the files in the National Archives for foreign land grants." Knipfing testified that he personally had not researched National Archives records in Suitland, Maryland, and that he was not personally aware whether others from the government (including Justice Department attorneys) might have conducted research at the Archives. J.A. 192-193. Elsewhere in his deposition, Knipfing stated that Bureau of Land Management staff had used the *American State Papers* in conducting their research (Tr. Knipfing Dep. 38-39), and indeed an attorney for the State of Mississippi, also a party to the *Adams* case, asked him a question concerning an entry in the *American State Papers* volume covering the Crawford Commission report (*id.* at 69). Knipfing also described at length the work of 19th century land commissions, including the Crawford Commission (*id.* at 38-58, 70-71), and noted that original commission reports for the *American State Papers* are located at the National Archives facility in Washington, D.C. (*id.* at 42), although he was personally unaware whether anyone from the government had reviewed the original Crawford Commission records (*id.* at 42-45). (We have lodged a copy of the transcript of Mr. Knipfing's deposition with the Clerk.)

Finally, respondents simply ignore the fact that in the *Adams* litigation, the government specifically brought to the court's attention the *American State Papers*' reference to Commissioner Crawford's rejection of the Boudreaus' claim.

3. *Respondents' Constitutional Arguments.*

Respondents argue (Br. 27-33) that the QTA must be read to permit tolling of the limitation period in this case, in order to avoid an unconstitutional result, namely the purported deprivation of their property without due process and without just compensation. That argument is without merit. In the *Adams* case, respondents had access to the full powers of discovery in federal litigation, and the government bore the burden of persuasion. Respondents had ample means to test the government's factual or legal arguments in that litigation. It can hardly be contended, therefore, that respondents were denied the "right to prior notice and a hearing * * * central to the Constitution's command of due process." *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). They had, in fact, the most process that the law knows. See *Davidson* v. *New Orleans*, 96 U.S. 97, 104-106 (1878).[4]

See U.S. Br. 6. Based on that notice, and armed with the information they obtained from the Knipfing deposition, respondents could have examined the original commission records of the Boudreaus' claim in the National Archives during the *Adams* litigation, as their researcher did nine years later.

[4] Respondents also vainly seek support in the discussion of due process in *Daniels* v. *Williams*, 474 U.S. 327 (1986). That case recognized that the Due Process Clause protects both procedural and substantive interests. The discussion on which respondents rely, however, also emphasized that the guarantee of substantive due process "has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property," and does not address negligent conduct. *Id.* at 331. Even under the most expansive possible reading of the due process guarantee, therefore, respondents would have to show that government officials' conduct of the *Adams* litigation amounted to an "abuse of power." *Id.* at 330, 332. The court of appeals did not suggest that the government officials

Nor is there support for respondents' assertion (Br. 30-32) that the *Adams* judgment was an uncompensated taking of their property. Respondents litigated their claim and received a substantial sum in settlement of the case, which they expressly stipulated to be "full and just compensation" for any claims they might have against the United States. Pet. App. 58a. "If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-195 (1985) (internal quotation marks and brackets omitted). Moreover, respondents' arguments are remote from the concerns of the Just Compensation Clause, which, "[u]nlike the Due Process Clause, * * * has never been held to require pretaking process." *Id.* at 196 n.14. Whatever procedural interests are served by the Just Compensation Clause were adequately protected by respondents' opportunity in *Adams* to put the government to its proof of its claim of title.[5]

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conducting the *Adams* litigation had engaged in such an abuse of power, and respondents do not take that position in this Court; they appear, in fact, to argue solely that they were deprived of their right to procedural due process, *i.e.*, the "full and fair opportunity to challenge the government's claim of title" (Resp. Br. 30).

[5] In arguing that they did not receive fair market value for the disputed lands on Horn Island, respondents rely heavily (Br. 5) on the $14,000-per-acre condemnation award entered by Judge Walter Nixon against the government for lands on nearby Petit Bois Island. Even aside from the fact that (unlike respondents) the landowners to the Petit Bois Island property had clear title to that land, there are several problems with respondents' reliance on the Petit Bois award. First, the Petit Bois Island condemnation award was issued on March 29, 1982,

4. *Appellate Jurisdiction.*

Respondents argue in summary fashion (Br. 35 n.12) that a court of appeals has authority to reverse a lower court's denial of summary judgment when that denial turned on question of law, rather than fact. We disagree with that proposition, for the reasons set forth in our opening brief (at 30-37), but we also note that, even if respondents' statement of the law is correct, the court of appeals clearly erred in reversing the district court's denial of their motion for summary judgment. The district court did not deny summary judgment because it rejected respondents' legal theories about the validity of the Boudreau Grant; rather, its "careful review of the record ha[d] yielded little or no evidence to support [respondents'] allegations of fraud, mutual mistake, and so forth," Pet. App. 43a, which evidence was necessary to justify relief under respondents' "independent action in equity," see *id.* at 5a. Thus, the district court's

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eight months before respondents agreed to receipt of the sum that they now assert fell short of the true market value of their property. See Resp. Mot. for Summ. Judg. Exh. 7-B; Pet. App. 60a. Respondents can hardly claim, therefore, to have been deprived of sufficient information about the value of their own land. Second, in the Petit Bois condemnation trial, the United States placed a value of $330,000 on the 717 acres at issue ($460 per acre)—a sum roughly comparable to the amount offered and accepted in settlement of the *Adams* litigation—in contrast to the Petit Bois landowners' valuation of $6.6 million. See *Nixon* v. *United States*, 703 F. Supp. 538, 545 (S.D. Miss. 1988), aff'd, 881 F.2d 1305 (5th Cir. 1989). Judge Nixon largely agreed with the landowners, and awarded them $6.1 million for the surface value of the 717 acres. 703 F. Supp. at 546. Despite serious concerns over the huge discrepancy between the government's valuation and the court's award, the United States ultimately decided not to appeal the Petit Bois award.

evaluation of the record led it to conclude that respondents had not shown the absence of genuine issues of material fact, such that they would be entitled to judgment: a classic denial of summary judgment because of outstanding questions of fact. Cf. *Johnson* v. *Jones*, 515 U.S. 304, 314 (1995).

5. *Effect of* United States *v.* Power's Heirs.

a. Respondents argue that this Court should not follow its decision in *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570 (1851), which held that a purported grant made by Bernardo de Galvez on the same day to lands on neighboring islands could not have been valid because Galvez lacked authority to make such a grant to those lands at that time.[6] They con-

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[6] Respondents argue (Br. 34 n.11) that this Court should not address any arguments about *Power's Heirs* or the government's defense of adverse possession because those matters were not raised in the lower courts. It became necessary, however, for the government to raise those defenses to respondents' claim of title to the disputed lands only after the court of appeals surprised the parties by ordering that title be quieted in respondents. Pet. App. 10a. Respondents' complaint did not raise a QTA claim, and the district court rejected their untimely attempt to amend their complaint to include such a claim (see *id.* at 49a n.1); nor did respondents' complaint pray that title be quieted in them (see J.A. 23-27); there was therefore no reason for the government to raise its substantive defenses to a claim of title in its answer. The litigation in the district court turned on whether that court had authority to reopen the judgment in *Adams*, which had extinguished respondents' claim to title and enjoined respondents from asserting any adverse claims to the disputed lands; it did not concern substantive issues of title. See Pet. App. 55a. The government was entitled to expect that the court of appeals would decide only whether the district court had erred in the decisions that the trial court had actually made, *viz.*, (a) respondents' complaint was untimely under Rule 60(b), *id.* at 43a;

tend that *Power's Heirs* is not binding precedent because it is an interpretation of foreign law (Br. 37). That argument, however, rests on the obsolete conception of the application of foreign law as a question of fact—a position long ago rejected by the federal courts, in which a determination of foreign law is treated as a question of law. See Fed. R. Civ. P. 44.1.[7]

In any event, the premise of respondents' argument is wrong, for *Power's Heirs* did not determine foreign law, as that concept is generally understood. The laws of Spain governing land grants in West Florida before the United States acquired the area in the Louisiana Purchase "were the laws not of a foreign, but of an antecedent government, to which the government of the United States * * * is the direct successor." *United States* v. *Perot*, 98 U.S. 428, 430 (1879). When the Court in *Power's Heirs* made a decision on Galvez' legal authority in 1781, it was determining whether the United States had acquired rights to the subject land by the Louisiana Purchase, and was therefore deciding a controlling point of federal law (and the very point that controls this issue).

That point explains why respondents' reliance on *Summa Corp.* v. *California ex rel. Lands Commis-*

(b) respondents' reliance on the "independent action" was "substantively and procedurally deficient," *id.* at 40a n.13, and (perhaps) respondents had provided no evidence of "fraud, mutual mistake, and so forth," *id.* at 43a. The district court decided no issues of title, and neither should the court of appeals have done so.

[7] Respondents rely on R. Schlesinger, et al., *Comparative Law* 88 (5th ed. 1988). That casebook, in turn, cited *Estate of Leefers*, 127 Cal. App. 2d 550 (1954), and *Smith* v. *Russo Asiatic Bank*, 160 Misc. 417, 290 N.Y.S. 471 (Sup. Ct. 1936), both of which treated questions of foreign law as questions of fact.

sion, 466 U.S. 198 (1984), is misplaced (see Resp. Br. 37-38). In that case, the parties disputed whether the California Supreme Court's interpretation of 19th Century Mexican land law was a matter of federal law, which would be freely reviewable by this Court, or state law, which would be binding on the Court. See 82-708 U.S. Amic. Br. at 7 n.2; Resp. City of Los Angeles Br. at 17-21, 22-27; Resp. California Br. at 23-26. When this Court stated in *Summa* that "we may take a fresh look at what Mexican law may have been in 1839," 466 U.S. at 201 n.1, it was not suggesting that its own prior interpretations of Mexican law could be lightly set aside; rather, the Court was indicating that, because the issue was ultimately one of federal law, this Court could review the state court's interpretation of Mexican law in that case.

b. This Court of course has the *power* to reconsider its precedents governing land law; the question here is whether respondents have demonstrated that this is a proper occasion for such an exceptional event, and they have not. Respondents argue that, contrary to the Court's conclusion in *Power's Heirs*, Galvez had been granted civil authority to alienate sovereign lands as of West Florida by August 1, 1781. Their historical arguments, however, do not make a persuasive case.

First, even if the British military officers who surrendered Pensacola acceded to Galvez' demand that the province be transferred to Spanish control immediately (see Resp. Br. 43-44), that does not mean that the articles of capitulation signed at Pensacola validly transferred *sovereignty* over West Florida

under either British or international law.[8] Respondents have not demonstrated that the British government had, or could have, delegated to the military commanders at Pensacola the authority to alienate British sovereign lands to other countries. We have also pointed out in our opening brief (at 40-42) that, to effect a transfer of sovereignty, international law required (and still requires) a formal cession by a peace treaty or a formal instrument of annexation, indicating a definitive and irrevocable passing of control of the surrendered area to the conquering sovereign. But one of the historical studies on which respondents rely notes that, after the surrender of Pensacola, Galvez ordered extensive defense measures because he anticipated that the English "very probably might try to recapture Pensacola." J.W. Caughey, *Bernardo de Gálvez in Louisiana, 1776-1783*, at 213 (1972). This was hardly a situation, therefore, where "the acquisition [was] completed and the ownership rendered permanent and absolute" (U.S. Br. 41).

Nor is there persuasive evidence that Spain extended its civil laws governing land transfers to West Florida before the 1783 peace treaty. Respondents contend (Br. 47) that, after Galvez took Pensacola, he ordered the commanding officer there to govern under the O'Reilly Code of 1769, which was also used to govern Spanish Louisiana. Even if that is true, it does not establish that Spanish land-grant rules, which were governed by the separate O'Reilly Regulations

[8] The Articles of Capitulation of Pensacola are set forth in *Diary of Bernardo de Galvez*, 1 La. Hist. Q. No. 1, at 75-83 (1917), a copy of which has been lodged with the Clerk.

of 1770, were also extended to West Florida.[9] Moreover, as we explain in our opening brief (at 44), as the conquering power with *de facto* authority over West Florida, Spain had the right—indeed the obligation—under international law to govern the area until its status was settled by the peace treaty. The fact that Galvez may have ordered Spanish military authorities to govern West Florida, for the time being, under the laws already in effect in Louisiana, and that he may have expected the peace treaty to cede West Florida to Spain definitively, does not establish that Spain had sovereignty over West Florida on August 1, 1781, the date of the purported Boudreau Grant.

Relying on General Halleck's 1861 treatise on international law (which did not cite or discuss the Court's earlier decision in *Power's Heirs*), respondents suggest (Br. 46 n.16) that, even if Spain did not receive sovereignty over West Florida until the Treaty of Versailles of 1783, nonetheless that treaty retroactively validated any Spanish land grants made in the area after its military occupation. But as we explain in our opening brief (at 41 n.23), that argument was available in *Power's Heirs* as well, for the Court was aware in that case that Spanish control over West Florida was confirmed by the 1783 treaty;

[9] The O'Reilly Code of 1769 is not the same thing as the Regulations of O'Reilly of February 18, 1770, setting forth the requirements for land grants in Spanish Louisiana, discussed in our opening brief (at 47). Respondents have not suggested that Galvez promulgated the latter in West Florida before 1783, and Professor Baade suggested in his legal opinion that the Spanish commander at Mobile, Enrique Grimarest, was probably unfamiliar with the text of the 1770 O'Reilly Regulations. See J.A. 171. Both the 1769 Code and the 1770 Regulations are reprinted at 1 La. L.J., Aug. 1841, at 1-65, a copy of which has been lodged with the Clerk.

indeed, the Court also knew that the treaty expressly provided that Spain would "retain" West Florida (U.S. Br. 45). Nonetheless, the Court declined to treat the 1783 treaty as having retroactively validated land grants made in 1781. The Court was evidently more persuaded by Chancellor Kent's discussion in his treatise—where he stated that "[d]uring war, the conqueror has only a usufructuary right to the territory he has subdued, and the latent right and title of the former sovereign continues, until a treaty of peace," 1 J. Kent, *Commentaries on American Law* 169 (3d ed. 1836)—and by Justice Story's similar discussion in *United States* v. *Hayward*, 26 F. Cas. 240, 246 (C.C.D. Mass. 1815) (No. 15,336). (Both of those authorities were cited by the government in *Power's Heirs*. See 52 U.S. (11 How.) at 574 (argument of counsel).) Whether or not international law might have permitted a different ruling, this Court in *Power's Heirs* decided not to adopt a rule of decision that the validity of land grants may be determined by events subsequent to the grant.

Fremont v. *United States*, 58 U.S. (17 How.) 542 (1855), relied upon by respondents (Br. 46 n.16), does not suggest a different result. That case involved a United States citizen's effort to gain recognition of his ownership of land that he had purchased from a private Mexican citizen in California in 1847, after the United States had conquered the area but before the 1848 peace treaty with Mexico. The Mexican seller, Alvarado, had obtained the land pursuant to a grant from the Mexican authorities of California in 1844, while California was still under Mexican sovereignty. See 58 U.S. (17 How.) at 561-562. *Fremont* therefore did not involve any question of the right of American citizens to purchase (or the power of American officials to sell) lands in the *public*

domain before sovereignty in the area was vested in the United States in 1848, and therefore is irrelevant to this case.[10]

Finally, even if we assume that respondents' version of the events of 1781 is correct and that *Power's Heirs* was decided on the basis of incomplete information, stare decisis still strongly counsels against overruling that decision. It would be extraordinary

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[10] Moreover, the Court in *Fremont* noted that, as a general matter under Spanish law, land grants did not become complete and valid unless an actual survey was performed and a plat was returned to the granting authorities setting forth the precise boundaries of the granted land. 58 U.S. (17 How.) at 554. (*Fremont* itself recognized an exception to that rule on the facts of that case, for reasons not relevant here, see *id.* at 557-558.) See also *United States* v. *Boisdoré*, 52 U.S. (11 How.) 63, 76 (1851) (argument of counsel) (setting forth Article 12 of 1770 O'Reilly Regulations, requiring actual survey); *id.* at 95-96 (holding claim in that case invalid, for want of actual survey). Respondents contend that the Boudreau Grant was a complete and valid grant, and that the requisite survey was performed. See Resp. Br. 39; J.A. 103-105. We disagree; we believe the evidence found in the National Archives does not demonstrate any actual survey, and in particular, that the map accompanying the copy of the Boudreau Grant, J.A. 104, is not an actual survey map but rather a "figurative" or "conjectural" map that frequently accompanied applications for grants before such were issued. See *Scull* v. *United States*, 98 U.S. 410, 420 (1879); *Muse* v. *Arlington Hotel Co.*, 68 F. 637, 640-641 (C.C.E.D. Ark. 1895), error dism'd, 168 U.S. 430 (1897). "Until [an] actual survey [was] made, no specific parcel of land was segregated from the public domain; and unless such a survey was made before the cession of Louisiana to the United States, no title passed to [any private party]." *Id.* at 641. In the absence of evidence of an actual survey (and other requisites for compliance with the O'Reilly Regulations), respondents have at most a claim to an "incomplete grant," which is jurisdictionally barred by the Act of June 17, 1844, ch. 95, 5 Stat. 676, as explained in our opening brief (at 47-48).

for the Court to overturn a decision that has definitively governed title to West Florida lands for 147 years. There is, moreover, reason to believe that a decision abrogating *Power's Heirs* would affect title in lands other than those at issue here (see U.S. Br. 46), including privately held lands, a factor significantly weighing in favor of adherence to precedent.[11] The Court should, therefore, follow its customary course, which is to recognize that "[d]oubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change." *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 487 (1924).

* * * * *

For the foregoing reasons and for those set forth in our opening brief, the judgment of the court of appeals should be reversed.

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[11] Department of the Interior records indicate that, after 1908, the United States patented out some lands on Horn Island to private ownership, and that some of those lands remain privately held. A party who could trace a claim of ownership to Horn Island based on the Boudreau Grant might, therefore, be able to cloud the title of those privately held lands. Furthermore, various parties claimed in the 19th Century that Galvez made grants to other lands in West Florida between 1781 and 1783, including grants presented to but rejected by Commissioner Crawford, see U.S. Br. 46-47, and the purported grant at issue in *Power's Heirs*. Should that decision now be overruled, even the successors in interest to the claimants in that case might now be able to revive their claim.

None of the lands on Horn Island currently in private ownership has any connection to the lands claimed by respondents in this case. The existence of those 20th Century patents to Horn Island lands explains why, when the National Park Service began the process of acquiring properties for the Gulf Islands National Seashore, it appraised privately held lands on Horn Island. See Resp. Br. 2 n.2.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CHRIS W. BEGGERLY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General

LOIS J. SCHIFFER
Deputy Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

MARTIN W. MATZEN
WILLIAM B. LAZARUS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN D. LESHY
Solicitor

MARGARET P. FONDRY
Attorney
Department of the Interior
Washington, D.C. 20240

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QUESTIONS PRESENTED

1. Whether an "independent action" brought against the United States to set aside a consent judgment entered in a previous quiet title action brought by the United States may be premised on "ancillary jurisdiction" deriving from the original quiet title action, and does not require an independent jurisdictional basis including a waiver of sovereign immunity.

2. Whether the 12-year statute of limitations applicable to actions against the United States brought under the Quiet Title Act, 28 U.S.C. 2409a(g), is subject to equitable tolling.

3. Whether the court of appeals had appellate jurisdiction to review the district court's denial of respondents' motion for summary judgment.

4. Whether the court of appeals erred in reopening the consent judgment and upholding respondents' claim of title to lands in the State of Mississippi based on a 1781 land grant by a Spanish governor who, as this Court held in *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570 (1851), had no authority to make such a grant.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-731

UNITED STATES OF AMERICA, PETITIONER

v.

CHRIS W. BEGGERLY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The court of appeals' opinion rendered on rehearing (Pet. App. 1a-16a) is reported at 114 F.3d 484; its initial decision (Pet. App. 17a-31a) is unreported. The district court's order granting the government's motion to dismiss and denying respondents' motion for summary judgment (Pet. App. 32a-44a) is unreported, as is its order denying reconsideration (Pet. App. 47a-51a).

JURISDICTION

The court of appeals entered its initial judgment and decision on May 29, 1997. On July 28, 1997, the court of appeals issued a new decision and also denied a petition for rehearing. Pet. App. 52a-53a. The petition for a writ of certiorari was filed on October 27, 1997 (a Monday), and was granted on January 9, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

Reprinted in an appendix to this brief (App., *infra*, 1a-3a) are the pertinent provisions of 28 U.S.C. 1291, 28 U.S.C. 2409a, and Federal Rule of Civil Procedure 60(b).

STATEMENT

1. a. This case arises out of a dispute between respondents and the United States over ownership of lands on Horn Island, Mississippi, a barrier island on the coast of the Gulf of Mexico. Horn Island fell within the territory originally claimed by France as part of its province of Louisiana, which extended along the coast to the present boundary between Alabama and Florida. Under the Treaty of Paris of 1763, France ceded Louisiana east of the Mississippi to Britain and the rest of Louisiana (along with New Orleans) to Spain, and Horn Island then became part of the British province of West Florida. After Spanish military forces conquered the area in 1780-1781, the British ceded West and East Florida, including Horn Island, to Spain in the Treaty of Versailles of 1783. Spain returned part of West Florida, including Horn Island, to France under the 1800 Treaty of San Ildefonso. The United States acquired sovereignty over the area including Horn Island in the Louisiana Purchase of 1803.[1]

After the Louisiana Purchase, Congress established a commission to ascertain the titles and claims to lands east of the Pearl River in Mississippi, west of the Perdido River in Alabama, and south of the 31st degree of north latitude, an area that includes Horn Island. Act of Apr. 25, 1812, ch. 67, 2 Stat. 713. The 1812 Act required every

[1] See *United States* v. *Louisiana*, 363 U.S. 1, 80-81 (1960); *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570, 577-578 (1851); *Garcia* v. *Lee*, 37 U.S. (12 Pet.) 511 (1838); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 299-302 (1829), overruled in part on other grounds, *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51 (1833).

person claiming lands in that area under foreign grants to deliver evidence of the claim to the Commissioner, who was directed to examine the claims and to prepare a report on their validity for Congress. §§ 5, 7, 8; 2 Stat. 715, 716. In 1819, Congress confirmed the claims that were reported to be valid by Commissioner William Crawford, and directed the issuance of certificates and patents for the confirmed claims. Act of Mar. 3, 1819, ch. 100, §§ 1-2, 3 Stat. 528-530. No claims for lands on Horn Island were recommended by Commissioner Crawford or confirmed by Congress. To the contrary, in 1816, Crawford specifically rejected a claim to Horn Island by the heirs of "C[atalina] B[o]udreau" (variously spelled). See p. 6, *infra*.[2] In 1844, Congress permitted persons with claims to lands east of the Pearl River "which might have been perfected into a complete title" under a prior sovereign's laws to file suit in federal district court to substantiate such claims, with a right of direct appeal to this Court. Act of June 17, 1844, ch. 95, 5 Stat. 676; Act of May 26, 1824, ch. 173, § 1, 4 Stat. 52.[3] Neither party to this case has suggested that any lands on Horn Island were so claimed.

[2] Congress twice permitted persons whose claims had not been recommended for confirmation by the Commissioner to present additional supporting evidence (Act of Mar. 3, 1819, ch. 100, §§ 6-7, 3 Stat. 530-531; Act of May 24, 1828, ch. 93, 4 Stat. 299), and it subsequently confirmed several such claims (Act of May 8, 1822, ch. 128, 3 Stat. 707; Act of May 28, 1830, ch. 146, 4 Stat. 408). We are unaware of any claims recommended or confirmed for lands on Horn Island under those proceedings.

[3] The 1844 Act extended, to lands east of the Pearl River in Mississippi, provisions of an earlier act that had allowed those claiming lands in Arkansas and Missouri to petition the district court for recognition of their claims. See Act of May 26, 1824, ch. 173, 4 Stat. 52. Section 5 of the 1824 Act, and by incorporation the 1844 Act as well, provided that "any claim to lands * * * within the purview of this act, which shall not be brought by petition before the said courts, within two years from the passing of this act, * * * shall be forever

Since the early 1800s, the United States has openly acted as owner of Horn Island by conducting official government surveys of the Island. Such surveys are conducted only to establish the extent of publicly owned lands. See 43 U.S.C. 2, 52. An official plat survey for Horn Island was conducted in 1824, as were an official dependent resurvey conducted in 1846, a supplemental plat survey in 1907, and dependent resurveys in 1928 and 1979. J.A. 79-80.[4] In addition, since the mid-1800s, the President and Secretary of the Interior have issued a series of Executive Orders and Public Land Orders providing for the public use of lands at issue here and other lands on Horn Island, including use for military and lighthouse purposes, a chemical warfare station, a Coast Guard target range, and a wildlife refuge.[5]

b. Respondents' predecessor in interest, Clark Beggerly, Sr., purchased color of title to the lands at issue here, as well as other lands, by quitclaim deed at a delinquent tax sale offered by Jackson County, Mississippi, in 1950. Mr. Beggerly, Sr., paid $51.20 for 626 acres described as located on Horn Island; he and a friend also paid $31.25

barred, both at law and equity, and no other action, at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever, in relation to said claims." 4 Stat. 54.

[4] The resurvey conducted in 1928 reflected significant accretions and accordingly redesignated the lot numbers within the sections. Apparently, the new lot numbers were entered on the Bureau of Land Management tract books but not on county land records. That discrepancy explains why the government and respondents have, on occasion, referred to the disputed land by different lot numbers. See J.A. 11-12, 41-43, 60-61, 74, 79-80.

[5] See J.A. 80-81; Exec. Order of Aug. 30, 1847; Exec. Order of July 7, 1852; Exec. Order of Sept. 3, 1900; Exec. Order of Apr. 12, 1906; Exec. Order No. 4262 (July 3, 1925); Exec. Order No. 5562 (Feb. 20, 1931); Exec. Order No. 10,355, 17 Fed. Reg. 4831 (1952); Public Land Order No. 1636, 23 Fed. Reg. 3388 (1958).

for another 225 acres on the Island, of which he retained 103 acres upon later division. Pet. App. 32a-33a.

In 1971, Congress created the Gulf Islands National Seashore (GINS) consisting of various islands (including Horn Island) and mainland areas in Mississippi and Florida, 16 U.S.C. 459h, and authorized the Secretary of the Interior to acquire privately owned lands within the Seashore's boundaries. See 16 U.S.C. 459h-1. In 1972, the National Park Service began appraising lands within the boundaries of GINS, including some lands on Horn Island, as an initial step toward acquisition of properties. The 626-acre parcel claimed to be owned by respondents was appraised for $156,000, and the 103-acre parcel was appraised for $27,125. The Park Service offered respondents slightly larger amounts than those appraised values for the lands they claimed, conditioned on their delivery of clear title to the parcels. The government's title contractor, however, found no evidence that the United States had ever issued any patents for the property claimed by respondents. In the absence of clear title, the government did not further pursue purchase of the property from respondents. J.A. 75.[6]

[6] Respondents at one point maintained that their title derived from federal patents that had been issued to Indians in 1840 and recorded in the 1950s in the Jackson County Chancery Clerk's Office by an attorney acting for the 1950 tax-sale purchasers. Preliminary research by the government's title contractor suggested that respondents' title was derived from three patents issued to Indians in 1840, but subsequent research revealed that those Indian patents had in fact been issued for different lands in northeastern Mississippi, and that no patents had ever been issued for Horn Island. The confusion was apparently due to the fact that the Indian patents were issued for lands with similar range, township, section, and lot numbers, but within the Chickasaw or Choctaw Meridian in northeastern Mississippi, not the St. Stephens Meridian, where Horn Island is located. J.A. 41-42, 75; Piehl Dec. ¶ 2e; Fakkema Dec. ¶ 2g; see R. Minnick, *Public-Land Surveys*, in *The*

In 1979, the United States filed suit against respondents and almost 200 other defendants to quiet title in the United States to lands claimed by private persons on Horn Island, Petit Bois Island, and Ship Island. *United States of America* v. *Adams, et al.*, Civil Action No. 579-0338(C) (D. Miss.). For three years, the parties conducted research and discovery on their claims. During that litigation, the United States filed a pleading, in which it noted that a volume in the *American State Papers* containing the abstract of Commissioner Crawford's report to Congress on land claims east of the Pearl River referred to a claim, apparently to Horn Island, that was rejected by the Commissioner. See Memorandum in Support of Plaintiff's Opposition to Admission of Defendants' Exhibits 5-6 (filed 11/19/82); 3 *American State Papers, Public Lands* 7 *et seq.* (1834).[7] Crawford's report identified a claim by the "Heirs of C. Baudreau" to a grant purportedly issued on August 1, 1781, by Bernardo de Galvez, then the Governor of the Spanish province of Louisiana. *Id.* at 15, item 51. Crawford's report also explained that he had rejected the Boudreaus' and several other claims either because they were "forfeited—most of them under the Spanish law, for the want of inhabitation and cultivation; and do not appear to be entitled to confirmation under any law of the United States" (*id.* at 17); or because they were "derived from officers who had no right to grant, or, at most, not on so extensive a scale" (*ibid.*). In 1851, this Court held, in addressing claims to lands on two islands neighboring Horn

Surveying Handbook 970 fig. 28-5 (R. Brinker & R. Minnick eds., 1987); U.S. Dep't of the Interior, *Manual of Instructions for the Survey of the Public Lands of the United States* 60-61 (1973).

[7] We have lodged copies of this pleading with the Clerk. At a deposition in the *Adams* case, a government witness testified that government researchers had examined the original abstract of Crawford's report in the National Archives. J.A. 224.

Island, that, on August 1, 1781, Galvez had no legal authority to issue grants for lands east of the Pearl River. *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570, 579-580 (1851).[8]

In December 1982, respondents and the other defendants to the *Adams* litigation executed a settlement agreement in which they agreed to accept $400,000 as "full and just compensation and in full satisfaction of any and all claims of whatsoever nature * * * against the United States of America by reason of the settlement of the action," in return for entry of an attached consent judgment. Pet. App. 56a-58a. That consent judgment quieted title "in favor of the United States with regard to all lands and interests in lands on Horn and Petit Bois Islands which defendants have or may have claimed." *Id.* at 54a. The judgment also permanently enjoined the defendants (including respondents herein) from asserting any adverse claim to the property. *Id.* at 55a. As a result of the settlement, respondents received $208,175.87 of the $400,000 paid by the United States. J.A. 52-53.

c. Despite the settlement of the quiet title action, respondents continued to investigate their claim to the tax sale parcels. According to an affidavit later filed in this case, Edith Axelson, a researcher hired by respondents, stated that in 1991 she had located in the National

[8] Horn Island became part of the British province of West Florida after the 1763 Treaty of Paris. In 1781, Spain and Great Britain were at war, and the British forces surrendered West Florida to Galvez on May 9, 1781. The Court concluded in *Power's Heirs* that, although Spain held the relevant lands under military occupation on August 1, 1781, Spanish law had not been introduced into West Florida and Galvez had not been given civil power to grant lands there. Galvez was then the Governor of the Spanish province of Louisiana, but the Court held that his civil authority did not extend to West Florida. 52 U.S. (11 How.) at 579-580.

Archives documents relating to the "Boudreau Grant." J.A. 96. Axelson attached to her affidavit a copy of materials assertedly documenting an August 1, 1781, grant of Horn Island to Catalina Boudreau by Bernardo de Galvez. Those documents purport to state that, upon a petition by Boudreau's son, Galvez referred Boudreau's request for Horn Island to the Spanish military commander at Mobile, Enrique Grimarest, who subsequently referred the matter back to Galvez for action, and that Galvez then issued a grant. J.A. 98-105.

Respondents hired Hans Baade, a law professor at the University of Texas, to evaluate the legal validity of the Boudreau Grant, and Baade gave respondents a legal opinion that the grant was valid. See J.A. 117-185. Baade, however, made no reference to this Court's holding in *Power's Heirs*, 52 U.S. (11 How.) at 579-580, that Galvez had lacked legal authority to issue grants to lands east of the Pearl River on August 1, 1781. Nor did he address the existence of any chain of title between Boudreau and respondents.

2. On June 1, 1994, respondents filed a complaint in district court, requesting that the court set aside the 1982 settlement agreement and the consent judgment in *Adams*, and award them just compensation for an "inverse condemnation" effected by entry of that 1982 consent judgment. See J.A. 9-27. The complaint alleged that the district court had jurisdiction under 28 U.S.C. 1331, and also based on the court's "ancillary jurisdiction" derived from the *Adams* litigation. J.A. 9-10. Relying on the "Boudreau Grant," the complaint asserted that the United States had fraudulently represented federal ownership of the disputed property on Horn Island (J.A. 23-24); that "mutual mistake of a material fact" had caused respondents to agree to the 1982 settlement (J.A. 25); and that the entry of the 1982 consent judgment constituted a taking of

respondents' property without just compensation entitling them to a monetary award by way of inverse condemnation (J.A. 25-26). As relief, respondents sought to have the court set aside the judgment in *Adams* and award them "damages" of not less than $14,500 per acre, plus interest since 1982. J.A. 26.

In January 1995, the United States moved to dismiss the case, contending that there was no statutory basis for jurisdiction, including no waiver of sovereign immunity, for respondents' action to set aside the judgment in *Adams*. In March 1995, respondents filed a motion for summary judgment, in which they contended that the court had jurisdiction over this case as an "independent action" to set aside the consent judgment in *Adams*, based on its jurisdiction in *Adams*. J.A. 56; [Respondents'] Memorandum in Support of Motion for Summary Judgment 5, 16, 20-21. In addition, respondents argued (*id.* at 23-24) that both the Quiet Title Act (QTA), 28 U.S.C. 2409a, and the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491(a)(1), provided the district court with jurisdiction over their claims. In July 1995, respondents sought leave to amend their complaint to add the QTA and the Tucker Act as jurisdictional bases, but they did not seek to amend the relief sought in the complaint; in particular, they did not request that the district court quiet title to the Horn Island lands in *them*. See J.A. 238-240.

The district court granted the government's motion to dismiss and denied respondents' motion for summary judgment. Pet. App. 32a-44a. The court first observed that respondents' complaint was filed nearly 12 years after entry of judgment in *Adams*, well after the one-year period allowed by Federal Rule of Civil Procedure 60(b) for motions to set aside a final judgment based on mistake or fraud. *Id.* at 39a-41a. As for respondents' attempt to characterize their suit as an "independent action in equity,"

the court rejected that basis for relief as "substantively and procedurally deficient," and further concluded that the action was untimely under the equitable doctrine of laches. *Id.* at 40a-41a n.13.

The court also pointed out that a party seeking to set aside a judgment on the basis of fraud faces a "stiff standard of proof," and stated that respondents had "wholly failed to discuss [their] allegations of fraud in specific terms of the[] critical elements" of such a claim. Pet. App. 38a-39a n.9; see also *id.* at 39a-40a n.12 (court's "careful[] review[] [of] the record" establishes that respondents' "allegations are devoid of sufficient evidentiary support"). The court explained that the record "yielded little or no evidence * * * of fraud, mutual mistake, and so forth," and it concluded that "[t]he United States acted in good faith in the settlement of [the *Adams* litigation]." *Id.* at 43a. The court remarked that the United States "could have refused to pay for what it already owned"—noting that respondents' own attorneys had advised them at the time that they had no valid claim to the disputed lands—and it characterized the amount respondents had accepted in the *Adams* settlement as a "six-figure windfall." *Id.* at 43a-44a. The court also dismissed the Tucker Act claim as lying within the exclusive jurisdiction of the Court of Federal Claims. *Id.* at 42a-43a. Having ruled that the case should be dismissed for lack of jurisdiction, the court then denied respondents' motion for summary judgment. *Id.* at 44a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-16a. The court first concluded that the district court had erred in dismissing the complaint. According to the court, the time limits in Rule 60(b) for setting aside a judgment based on alleged fraud "do[] not 'limit the power of a court to entertain an independent action'" to set aside a judgment. Pet. App. 4a. The court also ruled that "an

independent action filed in the same court that rendered the original judgment is a continuation of the original action for purposes of subject matter jurisdiction." *Id.* at 4a-5a. Therefore, the court concluded, neither an independent basis for jurisdiction nor a waiver of sovereign immunity is required "to bring an independent action in the same court as the original action." *Id.* at 5a.

The court then addressed the merits of respondents' "independent action," and it ordered that the consent judgment in *Adams* be set aside. Pet. App. 5a-9a. "Crucial to that determination," the court stated, was its conclusion that the district court had erred in failing to recognize the validity of Galvez's 1781 grant of Horn Island to Boudreau. *Id.* at 6a. The court acknowledged that, in 1816, Commissioner Crawford had rejected the claim by Boudreau's heirs to Horn Island, but, it observed, Crawford was not given authority to adjudicate title but was required to submit claims to Congress for final action; therefore, Crawford's "refusal to accept the [Boudreaus'] application did not conclusively determine that Horn Island belonged to the United States." *Id.* at 6a-7a. But rather than remand the issue of the validity of the Boudreau Grant to the district court (which had not passed on the question), the court of appeals itself addressed the issue, and concluded —based on Professor Baade's affidavit offered by respondents in support of their motion for summary judgment (which the district court had denied)—that "the Boudreau Grant vested complete and valid title in Catarina Boudreau. On that record, therefore, we must conclude that the property at issue herein remained privately owned after the Louisiana Purchase and did not enter the

public domain of the United States" until the settlement of the quiet title action. *Id.* at 8a.[9]

Finally, the court ruled on what it called respondents' "Quiet Title Act claim" (Pet. App. 9a-11a). Even though respondents had only raised the QTA as an alternative basis for jurisdiction for their request for damages and vacatur of the consent judgment, and had not requested that the district court quiet title *in them*, the court read respondents' complaint as stating "alternative causes of action" and held that the district court had jurisdiction to adjudicate title under the QTA. *Id.* at 9a. Moreover, according to the court, since "the United States has no legitimate claim to the land, the validity of [respondents'] title is a legal certainty," and so title should be quieted in their favor. *Ibid.* The court did not address the United States' open ownership of Horn Island since the Louisiana Purchase, or the absence of any showing by respondents of a chain of title between Boudreau and the 1950 tax sale by which Clark Beggerly, Sr., acquired color of title to the land.

The court rejected the government's argument that any action by respondents under the QTA to adjudicate title in lands on Horn Island was barred by the statute of limita-

[9] The court stated that respondents' "involuntary settlement" of the *Adams* case, based on their "inability to prove their title" derived from the Boudreau Grant, was "directly caused by the government's failure to produce the grant and its misrepresentation that no private disposal" of the lands had ever been made. Pet. App. 8a. The court did not address the fact that the government had brought the claim of Boudreau's heirs to Horn Island, and Commissioner Crawford's rejection of that claim, to the attention of the court in the *Adams* litigation. See p. 6, *supra*. The court also did not consider this Court's *Power's Heirs* decision—holding that Galvez lacked authority to make grants east of the Pearl River—which Professor Baade had not discussed in his affidavit, and which the parties had not addressed in their briefs on appeal.

tions, which requires that a quiet title action against the United States be brought within 12 years of the date on which the claim accrues (defined as the date on which the plaintiff or his predecessor in interest knows or should know of the United States' claim to the land). Pet. App. 9a-10a; see 28 U.S.C. 2409a(g). The court acknowledged that respondents had brought their action more than 12 years after they knew of the United States' claim to the Horn Island lands, but, it ruled, the QTA's statute of limitations should be tolled in this case "on equitable grounds." Pet. App. 10a. "On the record before us," the court stated, "the government may not benefit from the limitations period," in light of what it believed to be "the diligence displayed by [respondents] in seeking the truth and pursuing their rights, which resulted in their discovering a grant that apparently not even custodians of the public land records could or would locate." *Ibid.* Accordingly, the court tolled the QTA's limitation period for respondents' benefit and remanded the case to the district court to enter judgment quieting title in their favor, subject to the United States' election to retain the property and pay respondents just compensation for it. *Id.* at 10a-11a.

SUMMARY OF ARGUMENT

I. A. The court of appeals erred in ruling that the district court had authority to entertain this lawsuit as an "independent action" in equity brought to vacate the consent judgment entered in the prior quiet-title action brought by the United States, *United States* v. *Adams*. The Federal Rules of Civil Procedure make clear that relief from final judgment must be sought either by filing a motion under Rule 60(b) in the original litigation or by instituting an entirely new action, and that all other ancillary forms of relief from judgment, such as bills of review in equity, have been abolished. Because the time for filing

a Rule 60(b) motion in *Adams* had long elapsed, respondents' only potential recourse was to file a new action against the United States.

Such a lawsuit, however, could not go forward because of the absence of any statutory source of jurisdiction or waiver of sovereign immunity to authorize it. The district court could not exercise ancillary jurisdiction over this action based on its jurisdiction in *Adams*. Ancillary jurisdiction is limited to authority to adjudicate issues intertwined with those in the initial case—which authority terminated here when final judgment in *Adams* was entered—and authority to ensure complete execution of the judgment in the initial litigation—which authority is not at issue here because respondents seek to vacate, not vindicate, the *Adams* judgment. In the absence of any statutory source of authority for the district court to decide this action, that court properly dismissed the suit. A contrary rule would undermine the important principles of finality underlying Rule 60(b) and in the law generally, which are at their height in cases involving attempts to revive settled land disputes.

B. This lawsuit may not proceed under the Quiet Title Act (QTA). Respondents concededly filed this action after the lapse of the QTA's 12-year limitation period. The QTA's statute of limitations is not subject to equitable tolling based on respondents' allegations of government misconduct. The QTA's statute of limitations permits a plaintiff to bring suit against the United States within 12 years after he knew, or should have known, of the government's claim to the land at issue, and thus it already incorporates equitable considerations. Whereas government misconduct might delay the date when the plaintiff knew or should have known of the government's claim, and therefore when the plaintiff's claim accrued, it should not also provide a basis for equitable tolling of the limitation

period after that date. Furthermore, the facts of this case, as found by the district court, do not demonstrate any government misconduct warranting such tolling.

II. A. Even if the district court did have authority to entertain this case, the court of appeals erred in ordering that title be quieted in respondents. When the district court denied respondents' motion for summary judgment, it rejected their contention that they were entitled to judgment as a matter of law on their allegations of fraud and mistake in the *Adams* case. That denial of summary judgment was not subject to review in the court of appeals, for it was neither a final decision nor an appealable collateral order; nor did it affect the final judgment of dismissal entered by the district court. Once the court of appeals reversed that dismissal on jurisdictional grounds, there was nothing left for the higher court to review. And even if there are some circumstances in which a court of appeals may review a denial of summary judgment under its discretionary pendent appellate jurisdiction, this is not such a case, for there were numerous unresolved issues of fact and law that the district court had not addressed, which were not suited for decision in the first instance by the court of appeals. Thus, at a minimum, the court of appeals should have remanded the case.

B. The court of appeals' disposition of the case was also erroneous on the merits. Respondents are not entitled to quiet title because their claim is based on a purported land grant made by the Spanish Governor of Louisiana in 1781, who, this Court held in *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570 (1851), had no authority at that time to make such a grant because Spain in 1781 exercised only military occupying power over the area, not full sovereignty. Respondents have pointed to no special justification for this Court to overrule *Power's Heirs*. The policy of *stare decisis* is particularly weighty for decisions, such

as *Power's Heirs*, involving long-settled legal rules governing land titles. And the historical evidence put forward by respondents does not in any event suggest that, at the time in question, Spain exercised full sovereignty over Horn Island. Finally, even if *Power's Heirs* were not to be followed, the court of appeals' order quieting title in respondents was error because there remain numerous factual and legal obstacles to respondents' claim.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED RESPONDENTS' ACTION

In reversing the dismissal of this case, the court of appeals concluded that the district court had jurisdiction over respondents' "independent action" to set aside the 1982 consent judgment under its "ancillary jurisdiction," premised on the subject-matter jurisdiction for the original suit, and that there was no need for respondents to invoke an independent source of subject-matter jurisdiction and waiver of sovereign immunity for their suit against the United States. Pet. App. 4a-5a. The court also held that the district court had jurisdiction to adjudicate respondents' claim to titie under the Quiet Title Act. *Id.* at 9a. Both of those conclusions were in error.

A. The District Court Did Not Have Authority To Entertain Respondents' Action As An Independent Action In Equity

1. Analysis of the district court's authority to decide this case must begin with the recognition that respondents were unable to proceed under the conventional procedure for seeking relief from a judgment based on mistake, newly discovered evidence, or alleged fraud—namely, a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). Clauses (1), (2), and (3) of

Rule 60(b) permit the district court to grant relief from judgment for reasons such as mistake, newly discovered evidence, and fraud, but only if the party seeking to avoid the effect of the judgment makes a motion for relief not more than one year after the judgment was entered. Respondents' action to set aside the *Adams* judgment was made almost 12 years after that judgment was entered, and so it was untimely under Rule 60(b)(1)-(3). See Pet. App. 39a-40a. Rule 60(b)(6) also permits the court, upon motion made "within a reasonable time," to grant relief based on "any other reason justifying relief from the operation of the judgment," but that provision could not avail respondents, for a motion under Rule 60(b)(6) may not be "premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988).

A motion under Rule 60(b) is the exclusive means by which a party may obtain relief from judgment in the original litigation in which the judgment was entered. When Rule 60(b) was amended in 1946, all other forms of relief from judgment that might be considered ancillary to the original action in which the judgment was rendered were abolished. As originally adopted in 1938, Rule 60(b) stated that it did not limit the power of the court "to entertain an action to relieve a party from a judgment, order, or proceeding." Fed. R. Civ. P. 60(b) (1938). There was uncertainty whether that clause had preserved the power of the district courts to entertain traditional ancillary forms of relief, such as common-law writs of audita querela and coram nobis and equitable bills of review, or whether it had saved only the power to entertain original and independent actions for relief from a judgment. See J.W. Moore & E. Rogers, *Federal Relief From Civil Judgments*, 55 Yale L.J. 623, 633-642 (1946); *Effect of Rule 60(b) on Other Methods of Relief From Judgment*, 4 Fed.

R. Serv. 942 (Callaghan) (1941); Fed. R. Civ. P. 60(b) Advisory Committee Note (1946).

To dispel that uncertainty, Rule 60(b) was amended in 1946 to expand the permissible bases for relief from judgment by motion,[10] and to make clear that the Rule's provision for motions for relief from judgment was exclusive of all other ancillary forms of relief. Based on the Advisory Committee's recommendation that "the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments," the Rule was refashioned to provide that "[w]rits of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." Rule 60(b). The Rule was also amended to state that it does not "limit the power of a court to entertain an *independent* action to relieve a party from a judgment." *Ibid.* (emphasis added). See Moore & Rogers, *supra*, 55 Yale L.J. at 692 ("The first saving clause is limited to independent actions; and the last sentence abolishes both the substance and procedure of the old ancillary remedies at common law and equity."). Thus, the Rule now prescribes that relief from judgment may be obtained only two ways—by a motion under the Rule itself, or by an "independent action." And "[i]f the right to make a motion is lost by the expiration of the time limits fixed in

[10] For example, before 1946, Rule 60(b) did not expressly provide for relief from judgment because of fraud or newly discovered evidence. Moore & Rogers, 55 Yale L.J. at 632, 686; see Advisory Committee Note.

these rules, the only other procedural remedy is by a new or independent action." Advisory Committee Note.[11]

The Federal Rules also did away with another form of ancillary relief from judgment that had been used in the 19th century, namely, a bill filed on the equity side of the court to enjoin the execution of a judgment entered on the law side of the same court, based on allegations that the judgment had been obtained through fraud.[12] That practice

[11] There is one important exception that is not at issue in this case. Rule 60(b) also does not "limit the power of the court * * * to set aside a judgment for fraud upon the court." A court has the inherent authority to vacate one of its judgments based on fraud perpetrated upon it, without regard to the time limits of Rule 60(b). See *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44 (1991); *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944); 12 J.W. Moore et al., *Moore's Federal Practice* § 60.21[4][a] (3d ed. 1997). Fraud upon the court, however, is limited to fraud "that affects the very integrity of the judicial process itself," *id.* § 60.81[1][b], at 60-226, involving grave perversions of justice such as bribery of a judge, jury tampering, and schemes to fabricate authorities cited to the court, *id.* § 60.21[4][a], at 60-52 to 60-53. See also *Wilson* v. *Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir.) ("[R]elief based on 'fraud upon the court' is reserved for only the most egregious misconduct, and requires a showing of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'"), cert. denied, 493 U.S. 977 (1989); cf. *Pacific R.R.* v. *Missouri Pac. Ry.*, 111 U.S. 505, 520 (1884) (upholding equitable authority to vacate judgment based on allegations that party's attorney had conspired with adversaries to obtain fraudulent judgment); *Dickey* v. *Turner*, 49 F.2d 998, 1000 (6th Cir. 1931) (recognizing court's power "to prevent its process from becoming an instrument of wrongdoing"). The district court in this case stated that there was no evidence to suggest fraud upon the court, see Pet. App. 40a-41a, and the court of appeals did not disturb that conclusion.

[12] See, *e.g.*, *Carey* v. *Houston & T.C. Ry.*, 161 U.S. 115, 127-131 (1896); *Johnson* v. *Christian*, 125 U.S. 642, 645 (1888); *Pacific R.R.* v. *Missouri Pac. Ry.*, 111 U.S. 505, 520 (1884); *Minnesota Co.* v. *St. Paul Co.*, 69 U.S. (2 Wall.) 609, 632-633 (1865); *Freeman* v. *Howe*, 65 U.S. (24

arose in chancery courts because common law courts had held that they had little or no power to grant a new trial because of fraud by a party, at least after the expiration of the term of court in which the judgment was rendered. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944); 4 J. Pomeroy, *A Treatise on Equity Jurisprudence* § 1365, at 986 (S. Symons ed., 5th ed. 1941). The courts considered those bills in equity to be supplemental or ancillary to the original action at law—at least when they were *not* brought against the government—and so in such circumstances, the courts did not require that the bills independently satisfy requirements of jurisdiction and venue, or that process be served as for an original complaint.[13]

The practice of filing a bill on the equity side to impeach a judgment at law became obsolete after the promulgation

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How.) 450, 459 (1861). Justice Story viewed a bill in equity to impeach a decree for fraud as "an original bill in the nature of a bill of review." J. Story, *Commentaries on Equity Pleadings* 400 (J. Gould ed., 10th ed. 1892). Bills in the nature of bills of review are abolished by Rule 60(b). See p. 18, *supra*.

[13] See *Carey*, 161 U.S. at 130 (diversity not required for proceeding on equitable bill); *Johnson*, 125 U.S. at 645 (same); *Pacific R.R.*, 111 U.S. at 522 (same); *Freeman*, 65 U.S. (24 How.) at 460 (same, *semble*); *Minnesota Co.*, 69 U.S. (2 Wall.) at 633 (new service of process not required). Nonetheless, bills in equity to restrain judgments at law could not be maintained against the United States in the absence of a waiver of sovereign immunity. *Hill* v. *United States*, 50 U.S. (9 How.) 385, 389 (1850); *United States* v. *McLemore*, 45 U.S. (4 How.) 286, 288 (1846); *Jones* v. *Watts*, 142 F.2d 575, 577 (5th Cir.), cert. denied, 323 U.S. 787 (1944); see also *Avery* v. *United States*, 79 U.S. (12 Wall.) 304, 307 (1871) (holding that, because "audita querela is a regular suit in which the parties may plead and take issue on the merits," it does not lie against the United States); *Zegura* v. *United States*, 104 F.2d 34, 35 (5th Cir.) (bill of review does not lie against United States absent its consent to suit), cert. denied, 308 U.S. 586 (1939).

of the Federal Rules, which merged the rules for law and equity, created a unified "civil action," provided that all applications to the court be made by motion, and eliminated terms of court. Fed. R. Civ. P. 1, 2, 7(b)(1), 77(a); see 28 U.S.C. 138; 4 J. Pomeroy, *supra*, § 1365, at 986 (noting that in most jurisdictions "[t]he original occasion for this special jurisdiction has disappeared" because "the courts of law have acquired, and constantly exercise, full powers to grant new trials," and "the special equitable jurisdiction with respect to this matter has become obsolete"). Thus, after the union of law and equity in the Federal Rules, a party may seek relief from judgment only (a) by filing a Rule 60(b) motion in the original action, or (b) by instituting a new action, if one lies.

2. An "independent action"—as the term indicates—is a new piece of litigation filed in district court as an original matter, seeking equitable relief from the effect of a prior judgment.[14] And, as with any original action filed against the government in district court, an "independent action" against the United States such as this one requires an independent statutory source of federal jurisdiction and a waiver of sovereign immunity. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, * * * which is not to be expanded by judicial decree." *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377

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[14] Because of the availability of the ancillary remedies discussed above, pp. 17-21, *supra*, truly independent actions were rare before the promulgation of the Federal Rules. The most notable examples were actions filed in federal court based on diversity to enjoin the enforcement of a state-court judgment. See *Johnson* v. *Waters*, 111 U.S. 640, 668 (1884); *Griffith* v. *Bank of New York*, 147 F.2d 899, 901 (2d Cir.), cert. denied, 325 U.S. 874 (1945); *McNeil* v. *McNeil*, 78 F. 834, 835-836 (C.C.N.D. Cal. 1897); see also *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 136 (1941) (discussing cases).

(1994). And of course the waiver of sovereign immunity must be unequivocally expressed in statutory text and must specifically embrace the remedy that the plaintiff seeks from the courts. *Lane* v. *Peña*, 116 S. Ct. 2092, 2096-2099 (1996).

Respondents cannot point to a statutory source of federal jurisdiction or waiver of sovereign immunity for this action. Jurisdiction in *Adams* was predicated on 28 U.S.C. 1345, which gives the district courts jurisdiction over suits brought by the United States as plaintiff. J.A. 41. Jurisdiction in this case, brought *against* the United States, cannot proceed on that basis. In particular, there is no proper basis in this case for the exercise of "ancillary jurisdiction" based on the *Adams* litigation, as the court of appeals mistakenly believed (Pet. App. 9a). As we have explained (pp. 18-21, *supra*), the Federal Rules abolished all forms of ancillary relief from judgment other than motions under Rule 60(b).

Nor do residual modern concepts of ancillary jurisdiction support district court jurisdiction in this case. This Court has explained that ancillary jurisdiction is limited to (a) the disposition by a single court of all factually interdependent claims, and (b) the exercise of a court's power to vindicate its authority and effectuate its decrees. See generally *Kokkonen*, 511 U.S. at 379-380. But "once judgment was entered in [*Adams*], the ability to resolve simultaneously factually intertwined issues vanished." *Peacock* v. *Thomas*, 516 U.S. 349, 355 (1996). And the relief sought by respondents in this case is not the *effectuation* of the consent judgment entered in *Adams*, but its vacatur. Ancillary jurisdiction "does not stretch so far." *Kokkonen*, 511 U.S. at 379; see *Peacock*, 516 U.S. at 357 (declining to extend ancillary jurisdiction beyond "attempts to execute, or to guarantee eventual executability of, a federal judgment").

Nor is there any other statutory source of authority for the courts to entertain respondents' "independent action."[15] Even if the general federal-question statute, 28 U.S.C. 1331, furnishes subject-matter jurisdiction, it does not assist respondents, for Section 1331 does not waive the United States' sovereign immunity. As the Court explained in *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37-38 (1992), a "broad jurisdictional grant" that contains no specific reference to the sovereign is not sufficient to waive immunity and authorize a suit against the sovereign to go forward. In *Nordic Village*, the Court rejected the argument that 28 U.S.C. 1334, which grants the district courts exclusive jurisdiction over property involved in a bankruptcy matter, empowers the courts to compel the United States to return money to an estate in bankruptcy proceedings. So too here, there is no waiver of sovereign immunity that permits the district court to entertain an action brought against the United States to invalidate a consent judgment obtained by the government in prior litigation, as to which the time for seeking relief from judgment under Rule 60(b) has passed.

3. The court of appeals' decision would render Rule 60(b) largely irrelevant. Whereas Rule 60(b) imposes a strict one-year time limit for relief from judgments based on fraud and the like, under the court of appeals' ruling, a party could invoke the ancillary jurisdiction of the district court well outside that one-year period and seek to overturn a judgment based on allegations of fraud. The ruling therefore greatly undermines the value of finality of judg-

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[15] The Quiet Title Act (QTA) provides jurisdiction and waives sovereign immunity for certain actions against the United States involving claims to interests in land. See 28 U.S.C. 1346(f), 2409a. As explained below, however, respondents' attempt to invoke the QTA is barred by the statute of limitations. See pp. 25-29, *infra*.

ments reflected in Rule 60(b) and generally in the law. That consequence is particularly troublesome in the context of cases such as this one, involving title to real property. This Court has repeatedly observed that "[t]he policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water." *Nevada* v. *United States*, 463 U.S. 110, 129 n.10 (1983). As the Court has explained:

> Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. * * * [W]here courts vacillate and overrule their own decisions * * * affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.

Minnesota Co. v. *National Co.*, 70 U.S. (3 Wall.) 332, 334 (1866); see also *Arizona* v. *California*, 460 U.S. 605, 620 (1983); *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687 (1979); *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 485-487 (1924); *United States* v. *California & Oregon Land Co.*, 192 U.S. 355, 358-359 (1904). The court of appeals therefore erred in concluding that the district court could exercise ancillary jurisdiction over this action.

B. The Statute Of Limitations Barred Respondents From Proceeding Under The Quiet Title Act, And That Limitation Period Was Not Subject to Equitable Tolling

The court of appeals did not merely conclude that the district court had jurisdiction to set aside the original judgment quieting title in the United States; it further directed the district court to quiet title *in respondents' favor* under the Quiet Title Act (QTA)—even though respondents' action was concededly filed more than 12 years after they knew of the United States' claim to the disputed lands, and was therefore outside the QTA's 12-year statute of limitations, 28 U.S.C. 2409a(g), and even though (as the district court ruled), respondents failed to move properly to amend their complaint to add a cause of action or prayer for relief based on the QTA, see p. 9, *supra*; Pet. App. 49a-50a n.1. The court of appeals held that the QTA's 12-year limitation period was subject to equitable tolling, and that the limitation should be tolled in this case. *Id.* at 10a. Those rulings were erroneous.

1. The QTA is the sole mechanism by which a party may bring the United States into court to force an adjudication of a title dispute involving land in which the United States claims an interest. See *Block* v. *North Dakota*, 461 U.S. 273, 275-276 (1983). The QTA is, moreover, addressed to an important aspect of the sovereignty of the United States, the ownership of property, which is subject to the plenary control of Congress. See U.S. Const. Art. IV, § 3, Cl. 2 (Congress has power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); *United States* v. *City and County of San Francisco*, 310 U.S. 16, 29-30 (1940). Suits under the QTA therefore implicate the core of sovereign immunity. See

Dugan v. *Rank*, 372 U.S. 609, 620 (1963) (suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain"); cf. *Idaho* v. *Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2040 (1997) (observing that Indian Tribe's suit against state officers was "the functional equivalent of a quiet title action which implicates special sovereignty interests").

Because of the special significance of publicly owned lands for the sovereignty of the United States, it is particularly important that title to those lands not be clouded or unsettled, beyond the permissible reach of title litigation that Congress has expressly authorized in the QTA itself. When Congress was considering proposals that led ultimately to enactment of the QTA, a concern was expressed that the United States would become subject to stale claims to publicly owned lands, as to which any defense would be difficult because of the passage of time. See *Block* v. *North Dakota*, 461 U.S. at 283. After close bargaining, Congress enacted an unusually generous 12-year statute of limitations, see *id.* at 283-284, but also "foreclose[d] totally any suit on claims that accrued more than 12 years prior to the [1972] effective date of the QTA," *id.* at 286 n.23. But if that limitation period is held subject to tolling, then the government could be forced frequently to defend its ownership of lands long believed to be definitively settled. In this case, for example, the United States has openly acted as owner of Horn Island since 1803, and there had been no attempt on the part of a private party to assert ownership to the disputed lands as against the United States since 1816. Yet now, years later, the court of appeals has held that respondents may challenge the United States' title under the QTA and has directed that title be quieted in respondents.

2. The court of appeals erroneously relied on this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), for the proposition that the statute of limitations for actions brought under the QTA may be equitably tolled. Pet. App. 10a & n.19. In *Irwin*, this Court held that actions against a federal agency under Title VII of the Civil Rights Act of 1964 are subject to equitable tolling, and stated that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. *Irwin*, however, involved a federal cause of action that may be brought against private parties as well as federal agencies, and well before *Irwin* the Court had held that the limitation period for bringing suit against a private employer was not jurisdictional but was subject to equitable tolling. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982). The Court concluded in *Irwin* that it would be anomalous to construe the limitations provision as strictly jurisdictional when applied to a federal agency as a defendant, but not when applied to other defendants. See 498 U.S. at 95-96.

No such anomaly arises from applying the statute of limitations strictly in cases under the QTA, whereas anomalies do arise from a holding that the limitation period is subject to equitable tolling. First, the QTA does not provide any mechanism for resolving title disputes among private parties; unlike the statute at issue in *Irwin*, the QTA has no application to defendants other than the United States. Thus, the QTA does not present the anomaly that would have existed in *Irwin* had the case been decided the other way—namely, permitting equitable tolling in suits against private parties but rejecting such tolling in suits based on the same statute brought against a federal agency.

Second, the text of the QTA strongly suggests that Congress did not intend the statute of limitations to be

subject to equitable tolling. Although the Court spoke in *Irwin* of a "rebuttable presumption" favoring the availability of equitable tolling in federal causes of action (p. 27, *supra*), it has also made clear that the courts should not apply a doctrine of equitable tolling when to do so would be fundamentally inconsistent with other aspects of a statutory structure set in place by Congress, including other provisions in the statute of limitations. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991); *United States* v. *Brockamp*, 117 S. Ct. 849, 852 (1997).

Equitable tolling of the QTA's unusually lengthy 12-year limitation period[16] is fundamentally inconsistent with the fact that the QTA's statute of limitations provides that the cause of action accrues only when the plaintiff or his predecessor in interest "knew or should have known of the claim of the United States." 28 U.S.C. 2409a(g). Whereas some limitation periods run from the event giving rise to the cause of action, whether or not the plaintiff was aware of it (see, *e.g.*, *Lampf*, 501 U.S. at 361-363), a plaintiff under the QTA is under an obligation to file suit only once he or his predecessor in interest knows of the government's claim, or reasonably should be aware of the facts giving rise to that claim. The QTA's statute of limitations therefore has an express "discovery rule" that already incorporates equitable considerations. Cf. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946); (noting that discovery rule is an equitable doctrine); *Klehr* v. *A.O. Smith Corp.*, 117 S. Ct. 1984, 1992 (1997) (similar).

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[16] That generous time for suit already incorporates equitable considerations, see *Hart* v. *United States*, 585 F.2d 1280, 1284-1285 (5th Cir. 1978), cert. denied, 442 U.S. 941 (1979), and as one judge has observed, "[l]iberal estoppel and tolling, tacked onto a long period of limitations, is double counting." *Cange* v. *Stotler & Co.*, 826 F.2d 581, 599 (7th Cir. 1987) (Easterbrook, J., concurring).

Allegations of misconduct by the government, such as concealment of material facts about the government's claim or misleading statements about the nature of that claim, might be relevant to determining when the plaintiff or his predecessor in interest "knew or should have known of the claim of the United States." But those considerations should not provide a basis for *also* concluding that the limitation period was subject to tolling, even where, as here, the plaintiff concededly did know of the United States' claim. Indeed, respondents' asserted predecessors in interest, the heirs of Catalina Boudreau, knew of the claim of the United States in 1816, when Commissioner Crawford rejected their claim based on the purported Spanish grant, and they then failed to file suit under the special jurisdictional provision Congress enacted in 1844. See p. 3, *supra*. Congress did not intend to revive such stale claims when it enacted the QTA in 1972.[17]

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[17] Even if the 12-year limitation period under the QTA were subject to equitable tolling in some circumstances—and even if the knowledge of respondents' asserted predecessors in interest were put to one side—there would be no basis for tolling here. First, the district court concluded that respondents had failed to move properly to amend their complaint to add a cause of action based on the QTA because they did not move to amend until after both sides had filed dispositive motions. Pet. App. 49a-50a n.1. The district court plainly did not abuse its discretion in relying on that ground to deny the motion to amend. Second, the district court, based on its "careful review of the record," found "little or no evidence to support [respondents'] allegations of fraud, mutual mistake, and so forth," and indeed found that "[t]he United States acted in good faith in the settlement of [the *Adams*] case." *Id.* at 43a. The court of appeals did not disturb that conclusion, but nonetheless ruled that the government may not benefit from the limitation period, in light of what it believed to be the "diligence" displayed by respondents, which (it stated) resulted in their discovering a grant that "apparently not even custodians of the public land records could or would locate." *Id.* at 10a. The court of appeals did not suggest, however, that government attorneys or other personnel were aware of

II. EVEN IF THE DISTRICT COURT HAD JURISDICTION OVER RESPONDENTS' ACTION, THE COURT OF APPEALS ERRED IN QUIETING TITLE IN FAVOR OF RESPONDENTS

A. The Court Of Appeals Erred In Reversing The District Court's Denial Of Respondents' Motion For Summary Judgment Rather Than Remanding The Case To The District Court

Even if the court of appeals' conclusion that the district court had subject-matter jurisdiction over this case were correct, its decision to address the merits of the land dispute *itself*, rather than remand the case to the district court (which had denied respondents' motion for summary judgment), was in error. At a minimum, once the court of appeals reversed the judgment of dismissal, it should have remanded the case to the district court for further proceedings.

1. The jurisdiction of the courts of appeals under 28 U.S.C. 1291 (under which the appeal in this case was taken) is limited to "final decisions" of the district courts. Ordinarily, a decision denying a motion for summary judgment is not final and hence not appealable. See *Johnson* v.

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or intentionally withheld information supporting the validity of a claim by respondents through the Boudreau Grant. In fact, in the *Adams* case, the government cited to the reprint of Commissioner Crawford's report in the *American State Papers*, where there was a reference to such a grant accompanied by an explanation why the grant did not confer title, and a government witness also referred in his deposition to the original of that report in the National Archives. See p. 6, *supra*. Nonetheless, respondents did not retain their expert to search the Archives until 1991, nine years after the consent judgment was entered. That delay is scarcely consistent with "diligence" on respondents' part. Moreover, the *American State Papers* and materials in the National Archives presumably were available to respondents (and their predecessors in interest) prior to the *Adams* litigation.

Jones, 515 U.S. 304 (1995); *Swint* v. *Chambers County Comm'n*, 514 U.S. 35 (1995). In denying a motion for summary judgment, a district court usually does no more than determine that the moving party is *not* entitled to immediate judgment as a matter of law. Such a denial is not an appealable "final decision," for it does not bring an end to the litigation, see *Catlin* v. *United States*, 324 U.S. 229, 233 (1945), nor does it conclusively resolve important matters separable from the merits in a manner that permits immediate appellate review, see *Swint*, 514 U.S. at 41-42.[18]

When a district court denies summary judgment on the ground that the movant has not established that there is no genuine issue of material fact such that it would be entitled to judgment as a matter of law, the court "does not settle or even tentatively decide anything about the merits of the claim. [The denial of summary judgment] is strictly a pretrial order that decides only one thing—that the case should go to trial." *Switzerland Cheese Ass'n* v. *E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966) (holding that such denials of summary judgment may not be appealed under 28 U.S.C. 1292(a)(1)); see also *Swint*, 514 U.S. at 42 (noting that district courts may reconsider denial of summary judgment). In this case, for example, the district court denied respondents' motion for summary judgment once its "careful review of the record ha[d] yielded little or no evidence to support [respondents'] allegations of fraud, mutual mistake, and so forth." Pet. App. 43a. At most,

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[18] There are, of course, well established categorical exceptions to that general rule, as where a defendant to a *Bivens* action or suit brought under 42 U.S.C. 1983 moves for summary judgment based on qualified immunity, and the district court concludes as a matter of law that the defendant's alleged behavior violated clearly established law. See *Johnson*, 515 U.S. at 311-312; *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). This case does not involve any such exception.

that decision determined that respondents would be required to prove their allegations at a full trial.

The district court's denial of summary judgment did not become reviewable on appeal merely because the district court also entered a judgment of dismissal on jurisdictional grounds. In many cases, of course, a court of appeals may, on appeal from a final judgment, review a district court's pretrial order and reverse the final judgment on the basis that the pretrial order was error, under the theory that the pretrial order was merged into and affected the final judgment. Thus, a court of appeals may reverse a final judgment if it concludes the district court erred in excluding evidence, striking a defense, denying intervention of right, refusing to certify a class action, or disqualifying (or refusing to disqualify) counsel. In those situations, however, the court of appeals reverses the final judgment because it concludes that the erroneous pretrial order caused prejudice to the appealing party in the litigation (or, less frequently, because the erroneous order is of a nature that requires reversal even absent prejudice). In other words, the reversal is based on the reasoning that the erroneous pretrial order produced an erroneous final judgment. See *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 375-376 (1987); *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 438-439 (1985); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377-378 (1981); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978); *United States* v. *MacDonald*, 435 U.S. 850, 859-860 (1978).

In this case, however, the district court's denial of summary judgment did not "produce" its final judgment of dismissal on jurisdictional grounds. Indeed, once it concluded that the case should be dismissed, the district court might well have treated respondents' motion for summary judgment as moot or irrelevant. And the court of appeals

could not have reversed the judgment of dismissal on jurisdictional grounds based on a conclusion that the denial of summary judgment was erroneous. If the district court's ruling on jurisdiction was correct, then respondents' motion for summary judgment was irrelevant on appeal as well. But if the district court's ruling on jurisdiction was incorrect and reversal was proper on that basis, then, once the judgment of dismissal was reversed, there was nothing more for the court of appeals to review. The case was thereby reinstated in the district court at the stage it had achieved at the time the district court dismissed it. At that point, the district court's denial of summary judgment, based on its review of the record at a particular point in the litigation, simply resumed its tentative (and non-appealable) character.[19]

The conclusion that the district court's denial of summary judgment was not reviewable on respondents' appeal

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[19] For lower court rulings to similar effect, see *Reich* v. *ConAgra, Inc.*, 987 F.2d 1357, 1362 n.6 (8th Cir. 1993) (denial of summary judgment not reviewable on appeal from summary judgment for adverse party); *Goodman* v. *McDonnell Douglas Corp.*, 606 F.2d 800, 804 n.11 (8th Cir. 1979) (denial of summary judgment not reviewable on appeal from dismissal for laches), cert. denied, 446 U.S. 913 (1980); *Burke* v. *Ernest W. Hahn, Inc.*, 592 F.2d 542, 546 (9th Cir. 1979) (denial of summary judgment not reviewable on appeal from dismissal for lack of jurisdiction); see also *Foy* v. *Schantz, Schatzman & Aaronson, P.A.*, 108 F.3d 1347, 1350 (11th Cir. 1997) (denial of motion to dismiss for failure to state a claim not reviewable on appeal from dismissal for lack of jurisdiction); *Akin* v. *PAFEC, Ltd.*, 991 F.2d 1550, 1563 (11th Cir. 1993) (denial of jury trial not reviewable on appeal from grant of summary judgment); *Milan Express Co.* v. *Western Surety Co.*, 886 F.2d 783, 785 n.1 (6th Cir. 1989) (denial of class certification not reviewable on appeal from dismissal for lack of jurisdiction); *Weil* v. *Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 26 (9th Cir. 1981) (denial of class certification not reviewable after reversal of judgment of dismissal).

in this case is consistent with this Court's strict yet practical approach to the final judgment rule. Permitting appellate review of such a denial does not advance society's and litigants' interest in an efficient judicial system. To the contrary, as the Court observed in *Stringfellow*, *supra*, with regard to the policy against pretrial appeals, premature appeals "burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial." 480 U.S. at 380. That point is well taken in this case, for even if the court of appeals correctly concluded that the district court had subject-matter jurisdiction over the action, the district court might have concluded on remand (as we argue below, pp. 37-42, *infra*), that respondents' claim failed as a matter of law because of this Court's controlling precedent, and the court of appeals might have agreed on a later appeal. Thus, neither court might have had to consider whether respondents were entitled to summary judgment on their claims of fraud and mutual mistake.

Furthermore, the courts of appeals are not institutionally better suited than district courts to review a summary judgment record. "[T]he issue here at stake—the existence, or nonexistence, of a triable issue of fact—is the kind of issue that trial judges, not appellate judges, confront almost daily." *Johnson* v. *Jones*, 515 U.S. at 316. A rule requiring, or even routinely permitting, appellate courts to pore over a record to decide whether the district court erred in denying summary judgment would lead to greater delay, when the parties' and courts' resources would be better expended in advancing towards the ultimate resolution of the case. See *ibid.*

2. Some courts have stated that, when the facts are not contested and the dispute between the parties involves only issues of law, then a court of appeals, after announcing the proper rule of law and reversing a final judgment

based on the application of an erroneous legal rule by the district court, may direct entry of summary judgment for the appellant.[20] That practice may be viewed as an exercise of discretionary pendent appellate jurisdiction. Cf. *Swint*, 514 U.S. at 50-51. Thus, when the case is "a simple one with simple facts," *First Nat'l Bank* v. *Lincoln Nat'l Life Ins. Co.*, 824 F.2d 277, 281 (3d Cir. 1987), the court of appeals may have discretionary authority to review an order denying summary judgment when the appeal of that denial involves purely legal issues that are the same as, or closely related to, the legal questions at issue on the appeal from the district court's grant of summary judgment for the appellee.

This, however, is manifestly not a case in which the court of appeals' exercise of discretionary pendent appellate jurisdiction was proper. The district court denied respondents' motion for summary judgment without reaching the merits of their claim of title, in light of its decision to dismiss the case. See Pet. App. 44a. The district court thus had no occasion to address numerous issues of fact and law governing respondents' motion for summary judgment on their claim to set aside the prior judgment, much less any contentions that title should be quieted in them. The district court also concluded that respondents had failed to bring forward evidence of fraud or mutual mistake that would justify reopening the *Adams* judgment. *Id.* at 43a. Yet the court of appeals ordered that title be awarded to respondents based on its

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[20] See, *e.g.*, *Swaback* v. *American Info. Technologies Corp.*, 103 F.3d 535, 543-544 & n.24 (7th Cir. 1996); *National Fire Ins.* v. *Bartolazo*, 27 F.3d 518, 518 (11th Cir. 1994); *Jones-Hamilton Co.* v. *Beazer Materials & Servs., Inc.*, 973 F.2d 688, 693-694 & n.2 (9th Cir. 1992); *Sacred Heart Med. Ctr.* v. *Sullivan*, 958 F.2d 537, 543 (3d Cir. 1992); *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*, 392 F.2d 706, 716 (5th Cir.), cert. denied, 393 U.S. 924 (1968).

conclusion that "the validity of [respondents'] title is a legal certainty." *Id.* at 9a.

The court of appeals' disposition of this case necessarily rested on the following premises: (a) respondents had established that there was no genuine factual dispute as to whether the government had engaged in "misrepresentation" (Pet. App. 8a) or "active[] misle[ading]" (*id.* at 10a); (b) Professor Baade's affidavit provided irrefutable and undisputed "evidence" of the validity of the Boudreau Grant (*id.* at 8a); (c) respondents had shown a chain of title between Boudreau and themselves; and (d) the title respondents claim had not been lost through abandonment or adverse possession. All those premises are incorrect.

First, the district court had concluded that respondents had produced "little or no evidence" of misconduct on the part of the United States (Pet. App. 43a); given that ruling, the court of appeals plainly abused its discretion in not remanding the case to the district court, at least for a reexamination whether the facts of this case supported an independent action in equity or equitable tolling under the QTA. Second, while the court of appeals relied on Professor Baade's "Memorandum on Title to Horn Island" for its conclusion that the record established Galvez's authority to grant Horn Island to Boudreau, Baade's memorandum stated only his *legal* opinion (J.A. 114, 185) and did not demonstrate the absence of a genuine issue of material *fact* as to the validity of the Boudreau Grant. While Federal Rule of Civil Procedure 56(e) permits a court to rely on unchallenged "facts as would be admissible in evidence," it does not permit a court to give dispositive weight to *legal conclusions* in an affidavit.[21] And third, neither the Baade

[21] Rule 56(e) requires that affidavits in support of motions for summary judgment "shall be made on personal knowledge," and also requires an affirmative showing that the affiant "is competent to testify to the matters stated therein." Legal conclusions, therefore, are not within the scope of affidavits offered under Rule 56. See 10A C. Wright et al., *Federal Practice and Procedure* § 2738, at 486-489 (2d ed. 1983).

affidavit nor any other filing in the record established the requisite chain of title or addressed why respondents had not lost whatever interest they might have had through abandonment or adverse possession. Accordingly, the court of appeals' reversal of the denial of summary judgment was error.

B. The Court Of Appeals' Decision On The Merits To Quiet Title In Favor Of Respondents Was Error In Light Of This Court's Decision In *United States* v. *Power's Heirs*

Finally, even if the court of appeals had appellate jurisdiction to review the district court's denial of respondents' motion for summary judgment, its decision on the merits to reverse that denial and to order that title be quieted in favor of respondents was substantively in error. That decision—which rested on the erroneous premise that "the Boudreau Grant was complete and valid under the Spanish law of 1781" (Pet. App. 8a)—conflicts with this Court's decision in *United States* v. *Power's Heirs*, 52 U.S. (11 How.) 570 (1851), which compels the conclusion that the Boudreau Grant would *not* have been valid when it was purportedly made.

1. *Power's Heirs* involved a claim by private parties against the United States to ownership of Deer Island and Ship Island, Mississippi. Those islands neighbor Horn Island and are also within the territory ceded by Britain to Spain in 1783 and later obtained by the United States in the Louisiana Purchase. The claimants in *Power's Heirs* contended that their predecessor in interest had received the islands pursuant to a grant from Galvez on August 1,

1781, the same date as that of the Boudreau Grant. They therefore argued, as respondents argue now, that the islands were held in private ownership before the Louisiana Purchase and therefore did not become part of the public domain in 1803.

This Court rejected that claim, on the basis that Galvez lacked authority to make such a grant on August 1, 1781. 52 U.S. (11 How.) at 577-580. The Court began its analysis from the background principle that, "[b]y the laws of nations, in all cases of conquest, * * * the rule is, that laws, usages, and municipal regulations in force at the time of the conquest remain in force until changed by the new sovereign." *Id.* at 577. The Court then reviewed the history of West Florida to determine if Spain had changed the "laws of property" in West Florida, "by virtue of which the public domain could be granted to private owners," before August 1, 1781. *Id.* at 577-578. The Court noted that the British forces in Pensacola surrendered West Florida to Spain on May 9, 1781, before the grant in question; it also observed that the 1783 peace treaty between Britain and Spain provided that "his Britannic Majesty will cede to his Catholic Majesty [of Spain] East Florida, and his said Catholic Majesty will retain West Florida." *Id.* at 579. Nonetheless, the Court found nothing in the history of West Florida during that period "indicating that the Spanish laws had been introduced into Florida [as of August 1, 1781], and superseded those of England, and that civil power had been vested in Galvez to grant lands." *Ibid.* The Court therefore concluded that the purported grant by Galvez had "no force." *Id.* at 580.[22]

[22] The Court also observed that, in the purported grant relied on by the claimants in *Power's Heirs*, Galvez supposedly granted the islands under his commission as Governor of Louisiana; but since that commission had not been extended to include civil authority over West Florida, the Court concluded that Galvez exercised only military authority over West Florida. Because Galvez was merely "a military officer in command" who did not have the power to grant lands in West Florida, the Court concluded that the supposed grant was void. 52 U.S. (11 How.) at 580.

Power's Heirs holds that Galvez had no legal authority to grant public lands in West Florida to private parties on August 1, 1781, the very date of the Boudreau Grant; it therefore compels the conclusion that respondents' claim, which rests on the premise that Galvez did have such authority, is invalid. *Power's Heirs* was consistent with principles of international law governing the transfer of sovereignty from one state to another by conquest, as reflected in both judicial decisions of this country and leading treatises. Under those principles, mere military occupation of territory does not transfer legal sovereignty of the territory to the conqueror; such a transfer may be effected only by a treaty of peace formally ceding the territory, or by a formal instrument of annexation issued by the conquering state after military resistance in the area ceases. See *Power's Heirs*, 52 U.S. (11 How.) at 579 (noting that "[a]t the date of the grant, Spain held in military occupation the country to the east of the island of Orleans, * * * liable to be divested by reconquest or surrender by a treaty of peace"). As Chief Justice Marshall explained in *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 541 (1828), "[t]he usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace." Similarly, Justice Story, as Circuit Justice, explained in a case arising out of the occupation of Castine, Maine, by British forces during the War of 1812:

> The right which existed [in Britain during the occupation of Castine] was the mere right of superior force, the allegiance was temporary, and the possession not that firm possession, which gives to the conqueror *plenum dominium et utile*, the complete and perfect ownership of property. It could only be by a renunciation in a treaty of peace, or by possession so long and permanent, as should afford conclusive proof, that the territory was altogether abandoned by its sovereign, or had been irretrievably subdued, that it could be considered as incorporated into the dominions of the British sovereign.

United States v. *Hayward*, 26 F. Cas. 240, 246 (C.C.D. Mass. 1815) (No. 15,336). And just one year before *Power's Heirs*, this Court followed those principles to conclude that the United States' military occupation of Tampico, Mexico, during the Mexican War did not change Tampico's status as a port of a "foreign country" (such that imports therefrom were subject to duty), because "[t]he power of the President under which Tampico * * * [was] conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy." *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850). See also *De Lima* v. *Bidwell*, 182 U.S. 1, 183-184, 194 (1901); *United States* v. *Huckabee*, 83 U.S. (16 Wall.) 414, 434 (1873).

Leading treatise writers held similarly that military occupation of territory does not effect a change in legal sovereignty, without a formal cession or annexation of the territory. Grotius wrote that "territory is not considered as captured at the moment it is occupied," and that mere occupation "is not sufficient for that effect which we are discussing [*i.e.*, the right to acquire captured territory], for which secure possession is required." 2 H. Grotius, *De*

Jure Belli Ac Pacis 667 (F. Kelsey trans., 1925). Vattel suggested that "it is only by the treaty of peace, or by the entire subjection and extinction of the State to which [occupied] towns and provinces belong, that the acquisition is completed and the ownership rendered permanent and absolute. A third party can not, therefore, obtain secure possession of a conquered town or province until the sovereign from whom it has been taken has either renounced it by the treaty of peace or lost his sovereignty over it by final and absolute submission to the conqueror." 3 E. de Vattel, *The Law of Nations* 308-309 (C. Fenwick trans., 1916).[23] Chancellor Kent expressed a similar view shortly

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[23] In discussing the "rule of postliminium"—which holds that territory conquered by one state during war and then recovered by its original sovereign in the peace treaty or upon recapture returns to its *status quo ante bellum*—Vattel noted that one who acquires property from a conqueror that has not obtained perfect title does so on the implicit risk that he will be ousted if the territory is recaptured by the original sovereign or returned to it in a peace treaty. 3 E. de Vattel, *supra*, at 315. Vattel then went on to state, however, that "if that town has been ceded to the enemy by a treaty of peace * * * then the rule of *postliminium* no longer operates in its favor, and the alienation of its property by the conqueror is valid and irrevocable." *Ibid.* See also 1 J. Kent, *Commentaries on American Law* 110 (3d ed. 1836) (relying on Vattel for principle that "if the real property * * * be ceded to the conqueror by the treaty of peace, the right of postliminy is gone forever, and a previous alienation by the conqueror would be valid").

It is not clear whether Vattel meant that such an alienation by a conqueror before a peace treaty would be valid under international law as against objection by a state, or whether a private grantee would necessarily have a valid claim as a matter of municipal law to land obtained from the conquering sovereign after its military occupation but before the peace treaty. In any event, this Court in *Power's Heirs* was aware that West Florida, including Deer and Ship Islands, was definitively recognized as Spanish territory by the 1783 peace treaty between Spain and Britain, see 52 U.S. (11 How.) at 579, yet it did not

before *Power's Heirs* was decided, see 1 J. Kent, *Commentaries On American Law* 110, 177 (3d ed. 1836), as have modern commentators.[24]

2. Under *Power's Heirs* and accordant authority, therefore, Galvez lacked authority to grant Horn Island to Boudreau on August 1, 1781, because Spanish civil law had not been extended over the territory; Spain at the time exercised merely occupying power over the area and had neither received Horn Island in a treaty of peace nor formally annexed Horn Island. Respondents raise several

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treat that peace treaty as having validated any grants made by Galvez during the military occupation and before the treaty. Accordingly, *Power's Heirs* stands for the proposition that grants to lands in West Florida by Galvez on August 1, 1781, were invalid because they were not authorized by Spanish law at that time, and were not retroactively revived by the 1783 peace treaty.

[24] Lauterpacht, for example, stated that "[c]onquest alone does not *ipso facto* make the conquering State the sovereign of the conquered territory. * * * Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory. * * * Conquered enemy territory, although actually in possession and under the sway of the conqueror, remains legally under the sovereignty of the enemy until through annexation it comes under the sovereignty of the conqueror." 1 L. Oppenheim, *International Law* 518-519 (H. Lauterpacht ed., 7th ed. 1948). In summarizing modern writings on the subject, Whiteman observed that "[t]itle by conquest is viewed as contingent upon the completion of a twofold process: *debellatio* plus subjugation traditionally exercised through annexation." 2 M. Whiteman, *Digest of International Law* 1111 (1963). Under Anglo-American approaches to the issue, "the objective fact (conquest) must be coupled with the subjective animus of annexing the conquered enemy state. * * * Conquest is the taking of possession of the territory of an enemy state by force; it becomes . . . transfer of sovereignty only if the conquered territory is effectively reduced to possession *and annexed* by the conquering state." 2 *id.* at 1113 (emphasis added; internal quotation marks omitted); see also 2 *id.* at 1123.

arguments why *Power's Heirs* should not be followed. Br. in Opp. 17-21. Those submissions, however, provide no basis for this Court to disregard its customary practice of *stare decisis* and to overrule *Power's Heirs*. See generally *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989) (emphasizing that "any departure from the doctrine of *stare decisis* demands special justification").

First, respondents argue that new historical evidence unavailable to the Court at the time of the *Power's Heirs* decision demonstrates that Galvez had in fact been granted civil authority in West Florida by August 1, 1781, and that Galvez therefore had the legal power to make the Boudreau Grant and similar grants. Respondents rely on an Order of the King of Spain of February 12, 1781, informing Galvez that, "for the present, and while you govern Mobile and Louisiana, their administration shall be independent of the Captaincy General of the Island of Cuba, and that Pensacola and its district shall be added to your jurisdiction as soon as they are occupied by the forces of the King."[25] See Br. in Opp. 17-18; J.A. 132. That Order, however, does not purport to be an *annexation* of West Florida, which would have been required for an assumption of sovereignty by Spain, and such an annexation would have been unlikely on February 12, 1781, when there was still British resistance in the area. See p. 38, *supra*. Nor does the Order purport to introduce Spanish *laws* into West Florida, which was required at a minimum to vest in Galvez the civil power to grant lands, see *Power's Heirs*, 52 U.S. (11 How.) at 579.

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[25] The original of the Order appears to be in the National Archives of Cuba. A translation of the Order is set forth in D. Corbitt, *The Administrative System in the Floridas, 1781-1821*, 1 *Tequesta* No. 2, 41, 42 (Aug. 1942). We have lodged copies of the *Tequesta* article with the Clerk.

Rather, the import of the Order was to permit Galvez to administer the conquered territories free of interference from Spanish colonial authorities in Havana. There was, of course, a necessity for the Spanish to vest the power to administer the conquered territories in *someone*, even before they were formally annexed or ceded. Under international law, the Spanish had the authority to administer the region until the status of the territories was definitively settled.[26] But the fact that the Spanish moved to establish a regular administration of the territories "for the present" (p. 43, *supra*), before a treaty of peace, does not establish that Galvez was then granted authority to make grants of sovereign lands in West Florida.[27]

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[26] Cf. *Dooley* v. *United States*, 182 U.S. 222, 230-231 (1901) (upholding tariffs on goods imported from Puerto Rico during its military occupation by American forces and until its formal cession by Spain, under President's power as Commander-in-Chief and principles of international law); *Neely* v. *Henkel*, 180 U.S. 109, 120-125 (1901) (similar; discussing and upholding U.S. administration of Cuba after military occupation of island); *Cross* v. *Harrison*, 57 U.S. (16 How.) 164, 189-191 (1854) (upholding tariffs imposed by military governor of California between military conquest and receipt of notification of ratification of peace treaty with Mexico).

[27] Respondents' reliance on the promulgation of the Kearny Code in New Mexico in 1846 (Br. in Opp. 20) is therefore wide of the mark. Although General Kearny promulgated a legal code for the administration of New Mexico quickly after that territory was captured in the Mexican War, the Kearny Code was not an instrument of annexation of New Mexico by the United States, nor did it purport to extend to New Mexico Congress's sovereign authority to grant public lands. Rather, the Kearny Code was promulgated as an interim measure for the administration of a territory under military occupation, as President Polk observed in his 1847 annual message to Congress. See 4 *A Compilation of the Messages and Papers of the Presidents* 494 (J. Richardson ed., 1897). New Mexico became part of the sovereign territory of the United States only upon the 1848 peace treaty with Mexico, as that treaty recognized in several places, and the United States returned to Mexico other lands that had come under American military occupation during the war. See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 924-925 (providing for evacuation of U.S. forces from Mexican territory), 926 (setting new boundary line), 929 (granting right of U.S. citizenship to Mexicans "now established in territories previously belonging to Mexico, and which remain in the future within the limits of the United States"), 932 (payment to Mexico "[i]n consideration of the extension acquired by the boundaries of the United States" under the treaty).

Second, respondents stress (Br. in Opp. 19) that the 1783 peace treaty between Britain and Spain provided that Spain would "retain" West Florida. That point, however, was known to the Court in *Power's Heirs*, see 52 U.S. (11 How.) at 579, and yet the Court did not find it significant. The treaty negotiators may have adopted the term "retain" simply to reflect the fact that Spanish forces already occupied West Florida. The true significance of the language of the 1783 treaty would likely have been more evident to the *Power's Heirs* Court than it is to today's litigants, who are almost 150 years farther away from the treaty. Thus, the already-addressed phrasing of the 1783 treaty is not a "special justification" warranting the overruling of *Power's Heirs*.

Third, respondents have relied on scattered historical incidents to argue that the Spanish Governors of Louisiana had the power to make, and did make, land grants in West Florida. The cited materials, however, do not prove the validity of Spanish grants in West Florida made before the peace treaty of 1783. *Murdock* v. *Gurley*, 5 Rob. 457 (La. 1843), cited by Professor Baade (J.A. 131), involved a land claim based on actions of the Spanish governors in 1788 and 1800, after the peace treaty. See 5 Rob. at 459-460, 463-466. Professor Baade also relied (J.A. 131) on an 1822 report of Don Vincente Pintado, the former Spanish

Surveyor General of West Florida, in which that official explained that he was unable to find records in Cuba of early Spanish land grants in Florida because, before 1798, the power to grant lands was held by the Governor of Louisiana, independent of authorities in Cuba. Although that report does state in passing that the Spanish Governor of Louisiana had authority to make land grants in West Florida "since it had been conquered by the Spanish arms upon the British, and their possession had been confirmed by [the 1783 peace treaty]," the report does not purport to address the precise question at issue here —whether grants made *before* the 1783 treaty were valid —and the thrust of Pintado's report was that he had no access to evidence of such grants. See 2 *A New Collection of Laws, Charters and Local Ordinances of the Governments of Great Britain, France, and Spain Relating to the Concessions of Land in their Respective Colonies* 339 (J. White ed., 1839).

Finally, respondents urge that our reading of *Power's Heirs* "casts doubt on all unconfirmed but complete" Spanish grants made in the West Florida area before the 1783 peace treaty. Br. in Opp. 20-21. In fact, it is respondent's argument that *Power's Heirs* should not be followed that threatens disruption of established land titles in the area. This Court has cautioned that considerations favoring *stare decisis* are "at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991); see also cases cited at p. 24, *supra*. To overrule *Power's Heirs* now could call into question many land titles in the West Florida area by reviving the possibility of claims to land being asserted on the basis of grants long thought to be invalid—including the purported grant at issue in *Power's Heirs* itself, and other purported grants by Galvez and Grimarest in 1781-1783 that were rejected

by Commissioner Crawford. See 3 *American State Papers, Public Lands*, *supra*, at 14-16, items 1, 3, 78.

3. Even if the Court were to conclude that *Power's Heirs* should not be followed, the court of appeals nonetheless erred in quieting title in favor of respondents, for there are numerous other factual and legal obstacles to respondents' claim. First, respondents have not established a chain of title between themselves and Boudreau. Even if the Boudreau Grant were valid in all respects, respondents would not be entitled to quiet title in the absence of establishing such a chain of title.

Second, respondents have failed to show that Catalina Boudreau fulfilled the conditions under Spanish law that were essential to establishing the Boudreau Grant as a valid and complete grant. At the relevant time, land grants in Spanish Louisiana were governed by the Regulations of Governor O'Reilly, dated February 18, 1770. See 4 *American State Papers, Public Lands* 3-4 (1859); *Power's Heirs*, 52 U.S. at 577; *Muse* v. *Arlington Hotel Co.*, 68 F. 637 (C.C.E.D. Ark. 1895). Those regulations included formal requirements of "an actual survey on the ground before the title of the crown was divested, followed by an actual putting the grantee in pedal possession; a proceeding which was the equivalent of delivery of seisin at common law." *Id.* at 640. Compliance with those regulations "was essential to enable [the claimant] to procure from the proper Spanish authority a complete title." *Id.* at 642; see also *United States* v. *Hughes*, 54 U.S. (13 How.) 1, 2 (1852); *United States* v. *Moore*, 53 U.S. (12 How.) 209, 222 (1852). Respondents have provided no evidence that Boudreau met those or several other legal conditions of a Spanish grant.

Thus, respondents have at most a claim based on an "incomplete grant" that, under certain conditions set forth by Congress (such as actual settlement of the land), might be

recognized as entitled to equitable recognition. Cf. *Power's Heirs*, 52 U.S. (11 How.) at 580. Congress in 1844 expressly permitted persons with claims to lands east of the Pearl River based on incomplete grants to present their claims for confirmation to a district court, with a right of appeal to this Court. See p. 3, *supra*. But in *United States* v. *Porche*, 53 U.S. (12 How.) 426, 432 (1852), this Court ruled that the 1844 Act established a jurisdictional bar against any action filed in any court after June 17, 1846, in relation to claims that such an incomplete grant was valid. Respondents are thus jurisdictionally barred from asserting the validity of a claim based on an incomplete grant 150 years after the statutory deadline.

Finally, respondents' claims should be deemed abandoned or barred by the United States' adverse possession. A land claim based on an alleged foreign grant is to be considered abandoned where, as here, there has been a great lapse of time before it is asserted. See *Hughes*, *supra*; *Moore*, *supra*; *Fuentes* v. *United States*, 63 U.S. (22 How.) 443, 460 (1860); *United States* v. *Repentigny*, 72 U.S. (5 Wall.) 211, 268 (1867). There is no evidence that respondents' supposed predecessors in interest, Boudreau's heirs, made any effort to assert a claim based on the 1781 Grant after its rejection in 1816 by Commissioner Crawford. Nor is there any evidence that the Boudreaus took actual possession of Horn Island adverse to other claimants; to the contrary, Crawford found that Horn Island had not been inhabited or cultivated. See p. 6, *supra*. And as noted above (p. 4, *supra*), the United States has long and openly exercised ownership rights over the disputed lands; it has thereby obtained them by adverse possession. See *Stanley* v. *Schwalby*, 147 U.S. 508, 519 (1893); *United States* v. *Stubbs*, 776 F.2d 1472, 1476 (10th Cir. 1985); *United States* v. *Stanton*, 495 F.2d 515, 517-518 (5th Cir. 1974). Accordingly, even if the jurisdictional and other

obstacles to further proceedings in this case could be overcome, respondents' claim should be dismissed on the merits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LOIS J. SCHIFFER
Deputy Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

JOHN D. LESHY
Solicitor

MARTIN W. MATZEN
WILLIAM B. LAZARUS
Attorneys

MARGARET P. FONDRY
Attorney
Department of the Interior

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APPENDIX

1. Rule 60(b) of the Federal Rules of Civil Procedure provides:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of co-

ram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

2. Section 2409a of Title 28, United States Code, provides in pertinent part:

§ 2409a. Real property quite title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. * * *

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

* * * * *

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced with twelve years of the

date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

3. Section 1291 of Title 28, United States Code, provides:

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.